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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 753

ALEXANDER BIRNS,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. _____.

ALEXANDER BIRNS,

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vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

The petitioner, Alexander Birns, asks that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio, made and entered on June 28, 1967 (Appendix 42a-43a) denying petitioner's motions for appeal of right and for leave to appeal. A motion for reconsideration was denied on July 26, 1967 (Appendix 43a). The consequence of the denial of these motions (two cases)*

* The Court of Appeals for Cuyahoga County, Ohio and the Supreme Court of Ohio treated the petitioner's assignments of error under two appellate case numbers—27812 and 28002 in the Court of Appeals; and 41013 and 41014 in the Supreme Court of Ohio. Both appeals stemmed from the trial in Common Pleas Case No. 81317 and are integral parts of that case. The two appellate cases and numbers are explained by the fact that a new case number was given petitioner's appeal from an order denying a motion for new trial on the basis of newly discovered evidence. In the Ohio practice this occasions a second appellate number and the ostensible bifurcation continues in the Supreme Court of Ohio although the cases are handled together at both Appellate levels.

Whenever reference is made in this petition to the record in the trial court it will be preceded by the prefix "R." When the record on the Motion for a new trial on the basis of newly discovered evidence is involved the prefix will be "NTR."

was the affirmance of the Ohio Court of Appeals (two cases) which had sustained the conviction of this petitioner who had been found guilty by a jury and sentenced in the Court of Common Pleas for Cuyahoga County, Ohio.

OPINIONS IN THE COURTS BELOW.

The Court of Common Pleas for Cuyahoga County, Ohio—the trial court—rendered no opinion.

The opinion of the Court of Appeals for the Eighth District of Ohio is officially reported in 10 Ohio App. 2d 103, 226 N. E. 2d 149 (1967) and is reprinted in Appendix 27a.

The Supreme Court of Ohio did not write an opinion. The entries denying petitioner's motions for appeal of right, for leave to appeal and for reconsideration are reproduced in Appendix 42a-43a.

JURISDICTION.

The final judgment of the Supreme Court of Ohio was entered on July 26, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3). Petitioner claims his conviction was acquired in violation of rights, privileges and immunities secured by the Constitution of the United States.

QUESTIONS PRESENTED.

I.

Whether evidence acquired in violation of the Fourth Amendment, and suppressed in a prior case against the petitioner, can be introduced in the present case without violating the Fourth Amendment, the notice clause of the Sixth Amendment and, finally, the Due Process clause of the Fourteenth on the ground that the use of such evidence convicts, or tends to convict, on a charge not laid.

II.

Whether the State violated the petitioner's right to Due Process of Law when it put a policeman on the witness stand to testify that he had heard an alleged bribe offer transmitted by radio while suppressing the fact that the automobile in which the policeman-witness was stationed to listen to the broadcast was involved in a collision with another car requiring the witness' absence from the vicinity of the radio receiver during an interval which was in the time period covering the crucial conversation.

III.

Whether deliberate and persistent questioning on unrelated issues to force the petitioner to invoke the privilege against self-incrimination in the presence of the jury violated his right of confrontation and right against self-incrimination contrary to the Fifth and Sixth Amendments and the Due Process Clause of the Fourteenth Amendment.

IV.

Whether petitioner's right to Due Process of Law was violated by the timing and quantity of publicity given his federal indictment for perjury—which coincided with final summation in the present case where the crucial issue was the weighing of petitioner's credibility against that of policemen.

V.

Whether the petitioner's right to Due Process of Law was violated by the T ial Court's failure to apply the "beyond a reasonable doubt" test to determine the effects of an error of constitutional dimension.

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution.

Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V:

"* * * nor shall any person * * * be compelled in any criminal case to be a witness against himself * * *."

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to * * * trial, by an impartial jury * * * to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; * * * and to have the Assistance of Counsel for his defense."

Amendment XIV:

"Nor shall any State deprive any person of life, liberty or property without due process of law."

Ohio Statutes.

The relevant portions of the pertinent Ohio Statutes involved are:

R. C. 2917.01:

"No person shall corruptly give * * * to a state, * * * or other officer any valuable thing, * * * to influence him with respect to his official duty."

R. C. 2917.07:

"No person shall, corruptly * * * attempt to influence a * * * witness, * * * or corruptly * * * obstruct or impede, or attempt to obstruct or impede, the due administration of justice therein."

STATEMENT OF THE CASE.

On July 23, 1964, the Defendant in this case and one Keeling were arrested at 5715 Brookpark Road in Parma, Ohio. An indictment for promoting a numbers game stemmed from the arrest (R. 671), hereafter called the first case. The indictment came down in the first case on July 28, 1964 (R. 669) and it (C.P. No. 80677) was still pending on November 23, 1954 (R. 669), the day of the events relevant to the present case, hereafter referred to as the second case. A motion to suppress the evidence in the first case on the ground of illegal acquisition was granted on October 26, 1965, *State v. Birns and Keeling*, C.P. No. 80677.* The present trial (i.e. in the second case) did not begin until December 7, 1965 (Tr. 2; Appendix 3a.)

The trial in the second case resulted in Defendant's conviction on two counts. These, in the vernacular, were bribery and witness tampering (Appendix 1a-2a). The convictions rested on an allegedly incriminating conversation and exchange of money between Defendant and a Parma Detective, Clarence Bennett, at the Beef and Bottle Restaurant in Parma, Ohio. (R. 106-107, 153, 191, 193, 621-622, 705-708, 1247.) Corroboration was claimed by another Parma law officer, one Frank Eschweiler, who

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* The ruling on that motion in the first case stood and still stands undisturbed. The State's motion for reconsideration (R. 671) was denied on January 31, 1966, *State v. Birns and Keeling, ibid.*

said he monitored the crucial conversation by radio.* The transmission was accomplished, it is claimed, by way of a transmitter concealed on the person of Detective Bennett and recorded through an open microphone on a tape recorder. (R. 84-88, 156-157, 165, 169-171.)

Early in the trial of the second case the State began to refer to various aspects of the first case including the evidence which had been suppressed.**

The ploy began with a view of premises involved in the first case (R. 20-23, 26, Appendix 3a-5a), continued in opening statement and was maintained, unabated, through final argument where part or all of 12 pages of transcript were used to dilate upon the first case. (R. 892-895, 971-972, 975-978, 987, 989, 990.) During the taking of evidence, the Court allowed extensive testimony about the nature of the numbers racket and the defendant's alleged relationship to it (R. 623-641; Appendix 8a-12a), including descriptions relating to physical items suppressed in the first case, *State v. Keeling, et al.*, C. P. No. 80677 (R. 639; Appendix 11a-12a), growing out of the raid and illegal seizure on July 23, 1964. This was done over the defendant's objections and motions for mistrial. (R. 624-629, 631, 634, 635, 638, 640, 876, 878-879; See Appendix 8a-10a, 10a-12a, 18a-19a.)

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* Eschweiler conceded considerable interference (R. 284), including police calls on the same receiver (R. 254), and admitted "editing" the parts he thought unimportant (R. 254) by turning the recorder on and off (R. 245, 254, 283, 288-290). See pp. 8-9, *infra*, for a discussion of yet another interference—a collision between the monitoring car and another automobile.

** The defense objected early, vigorously and permanently to any reference to the gambling charge beyond the introduction of the indictment (R. 23, 26-30, 38-40, 624-629, 634-635, 876-879.) (Appendix 4a, 5a-6a, 6a-7a, 8a-10a, 11a, 18a-19a.) The objection was renewed on motion for a new trial. (Appendix 24a-25a; R. 1049 et seq. 1211-1214, 1223.) The point was saved on appeal. (Appendix 25a-26a.)

In addition to permitting testimony related to suppressed materials and to an accusation not laid in the indictment in the second case, the trial court assisted the prosecution effort by permitting the jury to view the premises at 5715 Brookpark Road, the scene of the arrest in the first case, over defense objection (R. 23, 26-27, 29-30; Appendix 4a, 5a, 6a); the view also included (properly) the areas in the Beef and Bottle Restaurant, the scene of the crucial events in the case on trial (the second case). The order allowing "the view" referred *only* to "the place" (Tr. 2). To this *only* the defense agreed (R. 22; Appendix 4a). The defense did not anticipate and was not told of the Brookpark site view until just before it was proposed. The defense promptly objected by telephone and in the record on the return to court. (R. 23, 26-27, 29-30; Appendix 4a, 5a, 6a.) The objection was overruled. (R. 27; Appendix 5a.)

Detective Eschweiler was a key witness in the second case against the defendant. His testimony and related matters covered approximately one hundred and twenty-nine pages. (R. 239-322, 478-524.) The evidence he gave corroborated that of the other principal state witness, Detective Clarence Bennett. Bennett told of an allegedly incriminating conversation between Birns and him while at dinner at the Beef & Bottle Restaurant in Parma. Eschweiler testified that he clearly heard the conversation between the Defendant and Bennett over a radio receiver in his private car parked near the restaurant. (R. 244-249, 262.) This was so, Eschweiler said, even though the tape he was making with an open microphone and recorder in his automobile came out too garbled on the tape for much to be audible.* On trial he (Eschweiler) said:

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* See R. 476 for a distinguishable passage verifying the defendant's version of the colloquy (R. 476). This case illustrates

"I had the tape recorder on and off *throughout the duration of the conversation.*" (R. 245.) (Emphasis supplied.) (Cf. NT R. 53-54.)

A defense objection on the ground that the answer was not responsive resulted in the striking of the quoted material. (R. 245.)* Regardless of this strike, other and further testimony by Detective Eschweiler clearly implied constant auditory surveillance of the conversation. (See R. 244-245; 254; 289-290; 492; 510; Cf. NTR 59-60; 62-64; 70-71.)

Eschweiler also testified at the trial that he had told:

"Everything of relevance to this case, yes, I have.
Q. Everything?
A. Yes, sir.
Q. There is nothing more?
A. Not that I can recall." (R. 290.)

Nowhere does the Eschweiler testimony mention that his car was struck by another, nor that his vehicle was damaged, that he was out of his automobile at all during the crucial interval or that any other police officer was on the scene outside the restaurant during the monitoring (see R. 239-332, 478-524). Eschweiler concedes this (NT R. 50-51). Nor was information in his and Bennett's combined reports (State Ex. 9 and 10—received as Def's NT Ex. 6 and 7, NT R. 184) even though the second combined

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(Continued from preceding page)

one of the vices of electronic surveillance. If the tape is clear and incriminating, it is used against the accused. If it is not clear, or exculpatory material is wiped out by tampering, then the auditor's oral corroboration is available. The State has it either way where the recording is not made with a jack and cord directly connecting the receiver and the tape recorder. Although Defendant Birns demanded and received access to the tape when he learned of the recording (R. 127-128, 711), its garbled condition availed him nothing.

* But it retains status as a statement contradicting later testimony during the hearing on the motion for new trial.

report was *made* because the first was insufficiently detailed. Eschweiler testified at the trial on the merits that the first report (State Ex. 9, Def's NT Ex. 6) was a statement "regarding all the events" of the incident (R. 485, 487-492; NT R. 64-67, 70-71; cf. NT R. 83-84) but State Ex. 10 (Def's NT Ex. 7) was "more detailed." (R. 492.) That his car was struck by another during the monitoring interval was confirmed by three witnesses and their affidavits supported and corroborated in part by a police report* from the Parma Police Department [Def's Ex. B, C, D and E(1) and (2) attached to motion for new trial on newly discovered evidence] describing a collision on the evening of November 23, 1964, between a parked vehicle owned by Frank W. Eschweiler and an automobile driven by Donald E. Hale, one of the witnesses.

Both Detective Bennett and Detective Eschweiler testified that the collision information was conveyed to the prosecutors in charge of the case. (NT R. 51-52, 82, 190.) No one claims that disclosure to the defense was made on trial (cf. NT R. 50-51; see also entire transcript of trial testimony).

This point on the suppression of the collision information was saved by a motion for new trial based on newly discovered evidence (Appendix 26a) and on appeal. (Appendix 57a.)

It became apparent during the trial that defendant would be compelled to assert the privilege against self-incrimination if the prosecution persisted in questions concerning the defendant's income. The prosecution was so advised side bar in the presence of the court and out of the presence of the jury. Such action was necessary because a federal grand jury was then engaged in an in-

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* Acquired after the affiants first made the fact of the collision known to the defendant.

vestigation of the defendant's income. (R. 719-727, Appendix 12a-15a.) Nevertheless, the prosecution asked the questions over and over again. The court refused to interfere although requested to do so. (R. 719, 725-726-727, 727-732, 799, 803-804, 814, 884; Appendix 12a, 14a-15a, 15a-17a, 17a, 19a-20a.)

The Defendant Birns and his difficulties with the law were given extensive attention in all the news media before and during his trial on the charges in the instant case. [See Def's Exhibits (Motion for New Trial) 1 A-R; 2 A-JJJ; 3 A-R; 4; 5; 6 A-S; 7 A-11; and 8 A-DD.] The jury was not sequestered during this interval and was repeatedly given faulty admonitions. (Cf. R. 11-12, 198, 237-238, cf. R. 382, 495, 524, 571, 727, 840; Appendix 7a-8a, 8a, 18a.)

The cap was put upon the publicity when, after argument had begun in the present case (See R. 888), the media announced Birns' federal indictment on December 21, 1965, on charges of perjury in connection with his income tax. The Cleveland Press, perhaps the worst but certainly not the only offender, carried a banner headline on that day (see Def's Ex. 6-T, Motion for New Trial):

"U. S. GRAND JURY INDICTS SHONDER BIRNS"

A two-column head proclaimed:

"Perjury is charged by U. S. on Shonder Birns' Income Tax"

After this soak of publicity in the midst of argument, the jury got the case on December 23, 1965, and returned the verdict of guilty.

In ruling on the constitutional questions, the Trial Court either overruled them without a delineation of reason (R. 1186, Appendix 21a; R. 1237, Appendix 23a) or applied the reasonable probability "of a different result" test. (NTR 585; Appendix 23a-24a.)

REASONS FOR ALLOWING THE WRIT.

I.

Whether evidence acquired in violation of the Fourth Amendment, and suppressed in a prior case against the petitioner, can be introduced in the present case without violating the Fourth Amendment, the notice clause of the Sixth Amendment and, finally, the Due Process clause of the Fourteenth on the ground that the use of such evidence convicts, or tends to convict, on a charge not laid.

Since *Mapp v. Ohio*, 367 U. S. 643 (1961), it has been settled constitutional principle that evidence acquired in violation of the Fourth Amendment is amenable to a timely motion to suppress in state trials. The rule is not that the product of an illegal search should not be used in a particular way "but that it should not be used at all." *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 392 (1920). Any derivative of the illegal search is proscribed, *Wong Sun v. United States*, 371 U. S. 471, 486-487, 487-488 (1963). And federal standards for the application of Fourth Amendment rights set the minimal requirements for the states, *Ker v. California*, 374 U. S. 23 (1963).

To be sure the use at issue here is in a setting different from any Petitioner's research has discovered. That is, evidence suppressed in the first case was admitted over objection in the second case. However, if the evidence in the first case can be transported to, and used, in the second case, the policy determined by the constitutional standards of *Mapp v. Ohio, supra,* is defeated. To prevent a flagrant circumvention of that policy and define the limits of the exclusionary rule, the writ should issue here.

The Sixth Amendment requires that a defendant "be informed of the nature and cause of the accusation." In-

ferentially, at least, this right has been held basic to Due Process and therefore applicable to state proceedings, cf. *DeJonge v. Oregon*, 299 U. S. 353 (1937) and *Cole v. Arkansas*, 333 U. S. 196 (1948). Petitioner could not have notice of a charge not laid. Nor is procedural Due Process compatible with conviction on the unlisted charge.

The specific proposition is that the use of evidence suppressed in one trial to make the proof in a second convicts or tends to convict on a charge not laid. Whether this violates the Sixth Amendment notice clause has not been passed on by this Court in a State case.

II.

Whether the State violated the petitioner's right to Due Process of Law when it put a policeman on the witness stand to testify that he had heard an alleged bribe offer transmitted by radio while suppressing the fact that the automobile in which the policeman-witness was stationed to listen to the broadcast was involved in a collision with another car requiring the witness' absence from the vicinity of the radio receiver during an interval which was in the time period covering the crucial conversation.

Credibility judgments were crucial in this case. Fundamentally, the jury was called upon to determine whether the petitioner or two policemen were telling the truth. It follows that matters reflecting on the police credibility were crucial to decision and affected substantial rights of the petitioner. Nonetheless, suppression kept these matters from the jury. *Napue v. Illinois*, 360 U. S. 264, 269-270 (1959) has established that the use of false evidence affecting credibility denied Due Process:

"The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence * * *."

No case has been found in which this Court has had the occasion to decide that the *suppression* of evidence going only to credibility denied Due Process, but the implications of *Napue* reach the point. And the United States Court of Appeals for the District of Columbia has required a new trial for non-disclosure of evidence which had a bearing on the witness' credibility. *Levin v. Katzenbach*, 34 L. W. 2652 (5/19/66). The granting of the writ will provide an opportunity to clarify this issue.

In the present case, the police testified that the prosecution had knowledge of the collision before the trial began (NTR 51-52; 90). The assistant prosecutor argues that he would not say whether "we" had such knowledge or not but "* * * whether or not we had knowledge that there was a collision isn't important * * *" (NTR 583).

This case provides the occasion for this Court to firmly declare whether or not the federally guaranteed right to a fair trial in state tribunals allows state suppression of evidence vitally affecting the credibility of state witnesses. The facts here pose the obverse side of the principle in *Fahy v. Connecticut*, 375 U. S. 85 (1963).* Granting certiorari will allow the Court to determine whether the suppression of relevant evidence going to credibility which might have influenced the jury and can be treated as harmless error. Cf. *Chapman v. California* (S. Ct. of U. S. 2/20/67), 35 L. W. 4197, 4199.

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* That is, it was prejudicial to admit illegally seized evidence which corroborated police testimony. Here, illegally suppressed evidence would have reflected adversely on police credibility.

III.

Whether deliberate and persistent questioning on unrelated issues to force the petitioner to invoke the privilege against self-incrimination in the presence of the jury violated his right of confrontation and right against self-incrimination contrary to the Fifth and Sixth Amendments and the Due Process Clause of the Fourteenth Amendment.

It is settled constitutional principle that the right to confrontation is inherent in Due Process, *Pointer v. Texas*, 380 U. S. 400, 403 (1965); *Douglas v. Alabama*, 380 U. S. 415, 419 (1965). In *Douglas*, a convicted, separately tried "Co-defendant" was put on the stand and forced repeatedly into invocations of the privilege against self-incrimination in connection with a confession of his own which considerably damned the defendant on trial. The relevant principle of the *Douglas* case is:

> "The alleged statements clearly bore on a fundamental part of the State's case against the petitioner. The circumstances are therefor such that 'inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant.' " (Citing cases.)

This Court has not had occasion to apply the *Douglas* rule to a fact pattern in which the defendant is forced, as in this case, to invoke the privilege with respect to matters irrelevant to the issues on trial although it has said that cross-examination on a matter not in issue is not harmless error. *Pierson v. Ray*, 85 S. Ct. 1213 (1967).

But in *United States v. Maloney*, 262 F. 2d 535, 537-538 (Cir. 2, 1959), the prosecution called witnesses it knew would assert the privilege. The conviction was re-

versed. At page 537 the United States Court of Appeals stated the controlling principle:

> "When a witness claims his privilege, a natural, indeed an almost inevitable, inference arises as to what would have been his answer if he had not refused. If the prosecution knows when it puts the question that he will claim the privilege, it is charged with notice of the probable effect of his refusal upon the jury's mind."

See also *United States v. Compton* (Cir. 6, 8/4/66), 35 L. W. 2114 (unfair trial tactic if it appears counsel calls witness merely to force him to claim privilege).

The grant of the writ here would provide the occasion for delineating the application of the *Douglas* rule.

To allow the state to force invocation of the privilege on an unrelated issue will also circumvent the principle established in *Griffin v. California*, 380 U. S. 609, 613 (1965) proscribing prosecution comment on a defendant's failure to testify. There is no material difference in commenting on the accused's failure to take the stand and forcing the invocation on a question not in issue. Thus, by indirection the underlying policy of the *Griffin* case is frustrated, i.e., to prevent the "tendering to the jury for its consideration—the failure of the accused to testify." Furthermore, if it becomes established law that this prosecution tactic is consonant with due process, the effect will be to chill the accused willingness and desire to testify in his own behalf.

IV.

Whether petitioner's right to Due Process of law was violated by the timing and quantity of publicity given his federal indictment for perjury—which coincided with final summation in the present case—where the crucial issue was the weighing of petitioner's credibility against that of policemen.

The impact of a line of recent cases, e.g., *Rideau v. Louisiana,* 373 U. S. 723 (1963); *Estes v. Texas,* 381 U. S. 532 (1965); *Sheppard v. Maxwell,* 384 U. S. 333 (1966), supports the conclusion that fair trial requires that a conviction be free from the extraneous influences exercised by sources outside the courtroom, e.g., excess newspaper or television coverage. Here the petitioner seeks to add dimension to the principle—he claims that the timing of the publicity, as well as its volume, and its source, the federal government, give additional constitutional stature to his contention that publicity prevented his receiving a fair trial.

V.

Whether the petitioner's right to Due Process of law was violated by the Trial Court's failure to apply the "beyond a reasonable doubt" test to determine the effects of an error of constitutional dimension.

The trial court's test, sustained by the Court of Appeals, for the effect of constitutional error was that "the facts as it found them to be if presented to the jury would not within reasonable probability cause the jury to come to a different result." [See *State v. Birns,* 10 Ohio App. 2d 103, 226 N. E. 2d 149, 154 (1967), cf. Appendix 35a.)*] This test contravenes the standard

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*The Supreme Court of Ohio simply denied appeal of right and leave to appeal although the issue was raised. See excerpt from Memorandum in support of jurisdiction in Su-

for harmless error set by this Court in *Chapman v. California,* 35 L. W. 4197 (S. Ct. of U. S. 2/20/67) at p. 4199:

> "* * * we hold * * * that before a federal constitutional error can be held harmless, the court must declare a belief that it was harmless beyond a reasonable doubt." *

CONCLUSION.

This Court has established rules marking the minimum standards for due process in the administration of criminal justice. And, in connection with the application of statutory standards, the Court has indicated that it would intervene "when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp. v. N.L.R.B.,* 340 U. S. 474, 491 (1951). How much more appropriate that the Court intervene when a state misapprehends or grossly misapplies Constitutional standards. In five particulars the State of Ohio has ignored, misapprehended or grossly misapplied such standards in convicting the petitioner. The writ should issue to provide the Court an opportunity to examine the State of Ohio's stewardship of federal constitutional standards, to reaffirm existing standards, to buttress them by explaining and demonstrating new applications to prevent circumvention and, incidentally, to prevent petitioner's conviction in a trial conducted under conditions that flout Due Process of law.

Respectfully submitted,

JACK G. DAY,

Counsel for Petitioner.

(Continued from preceding page)

preme Court of Ohio, Appendix 40a-42a. See discussion of Opinions in the Courts below, *supra,* p. 2.

* That a constitutional point not available at time of trial may be raised later, see *Curtis Publishing Co. v. Butts,* 35 L. W. 4636, 4639 [text and fn. 5] (U. S. S. Ct. 6/12/67).

APPENDIX.

RELEVANT DOCKET ENTRIES IN THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY, OHIO, CASE NO. 81,317.

December 1, 1964: To Court: This day came the Jurors of the Grand Jury and having found, now present to the Court by and through their foreman, certain Bills of Indictment, against the following named persons for the following indicated crimes or offenses and endorsed by said foreman "A True Bill" and signed by him as foreman aforesaid and enumerated as follows:

81317 State of Ohio vs. Alexander Birns Indictment —Bribery w/c Attempt to Influence Wit. (Jr. 105-611.)

December 6, 1965: To Court: It is hereby ordered by the Court that this case is continued for trial to December 7, 1965. Charles W. White, Judge. (Jr. 108-462.)

December 8, 1965: To Court: * * * It being proper in the opinion of the Court for the jury to view the place where the crime occurred, it is ordered that the said jury be conducted in a body to the said place and the same shown to the jury in this case.

And the hour of adjournment having arrived, this case is continued until tomorrow morning. John L. Angelotta, Judge. (Jr. 108-477)

December 22, 1965: To Court: This day again came the Prosecuting Attorney on behalf of the State, and defendant Alexander Birns was brought into court, represented by counsel; also came the jury, duly impaneled and sworn, and retired to their room for further deliberation.

And now come the jury, conducted into court by the bailiff, and return the following verdict in writing, to-wit: "We, the jury in this case, being duly impaneled and sworn, do find defendant Alexander Birns guilty of bribery as charged in the first count of the indictment";

and, "We the jury in this case, being duly impaneled and sworn, do find defendant Alexander Birns guilty of attempt to influence witness, as charged in the second count of the indictment."

Thereupon, the Court informed the defendant of the verdict of the jury, and inquired of him if he had anything to say why judgment should not be pronounced against him, and he having nothing but what he hath already said:

It is, therefore, ordered and adjudged by the Court that defendant Alexander Birns be imprisoned and confined in the Ohio Penitentiary, Columbus, Ohio, for an indeterminate period, and that he pay the costs of this prosecution, for which execution is awarded.

It is further ordered that sentences on counts herein be served concurrently.

It is also ordered by the Court that execution of sentence in this case is stayed pending filing and hearing on motion for new trial. Defendant is released on same bond. J. L. Angelotta, Judge. (Jr. 108-544.)

December 28, 1965: Motion for New Trial, filed.

January 10, 1966: To Court: It is hereby ordered by the Court that defendant's Motion for new trial is overruled as to all branches. Defendant is released on his same bond. John L. Angelotta, Judge. (Jr. 109-129.)

January 21, 1966: Notice of Appeal on questions of Law, filed. Precipe, filed.

March 21, 1966: Motion for New Trial on Newly Discovered Evidence, filed. Exhibits A-B-B1-B2-C-D-E-F-G-H-I, filed.

May 6, 1966: To Court: This day again this cause came on for hearing on defendant's Motion for New Trial based on Newly Discovered Evidence, and the Court upon

hearing and full consideration, overruled said motion. J. L. Angelotta, Judge. (Jr. 113-71.)

May 23, 1966: Notice of Appeal and precipe, filed.

RELEVANT EXCERPTS FROM THE RECORD IN THE COMMON PLEAS COURT OF CUYAHOGA COUNTY, OHIO, CASE NO. 81,317.

(11) Tuesday, December 7, 1965, at 9:15 a.m.

* * * * *

Thereupon a jury was duly impaneled and sworn.

* * * * *

Thereupon the following proceedings were had:

The Court: * * * I will tell you at this time that counsel have asked for what we call a view of the scene, so that immediately after what I have to say to you in the morning you will be either escorted by taxicab or bus—I don't know what Mr. Satullo has for us—but you will be going to the scene of the alleged offense and then when you return here we will proceed with the part of the trial that is conducted here in the courtroom.

* * * * *

(20) Ladies and gentlemen, I told you late yesterday that we were going to ask you to view the scene of this alleged offense, and I would now like to relate my comments to that subject.

You will visit the scene involved in this case. You will be under the supervision of the bailiff. That will be Mr. Dudek. At all times. You will remain together until you are returned to the courtroom or otherwise excused by Mr. Dudek. The fact is, you will be returned to the courtroom, however.

* * * * *

(21) What you see at the scene is not evidence. The conditions may or may not have been changed since the time of the events in this case. The evidence as to the physical appearance of the scene must come to you from the witness stand.

* * * * *

(22) The Court: Mr. Donley, will you have the record show that the request to view the scene was made by counsel for the State of Ohio.

Mr. Garmone: And agreed to by counsel for the defendant.

The Court: And agreed to by counsel for the defendant.

* * * * *

(23) (Thereupon the jury viewed certain locations in the City of Parma.)

(Thereupon the following transpired out of the presence of the jury:)

Mr. Day: The defense objects to the Court order allowing the jury in the instant case to view the scene of the alleged crime in Case No. 80,677 for the reason that such view is not essential to the presentation of the evidence of a pending indictment in the last-named case and is prejudicial to the present case because it brings before the jury the facts of an alleged crime in a dramatic and sensational fashion unnecessary to the State's presentation, and moreover does so after the evidence in the original case No. 80,677 had been suppressed, including all evidence as to the manner of execution of a warrant at the premises of 5715 Vulcan Avenue, which in the view of the defense means that nothing with respect to those physical premises is relevant or admissible in the present case, and prejudicial to the defendant in the case now in trial.

* * * * *

(26) The Court: * * * and of course the Court hasn't heard the State's evidence at this time and there is nothing we can do at this time to rule out the view, which is a discretionary matter.

Mr. Day: May I add something so that I don't foreclose my right. The basis of the defense opposition and objection is both an abuse of discretion by the Court under the existing state statutes and a violation of the Fourteenth Amendment to the Federal Constitution, because the interjection of an irrelevant view is a contravention of due process under the Fourteenth Amendment and under the equivalent clause in the Ohio Constitution.

* * * * *

(27) The Court: Thank you, Mr. Fleming. Anything further, gentlemen?

Mr. Day: Only this, that the granting of a view of the premises at 5715 Brookpark interjects an emphasis which impinges upon due process, and this is in part theoretical argument in connection with the Constitutional violation.

The Court: Gentlemen, the request for the view was made and the request was granted, and the objections are now part of the record. We will proceed.

Mr. Day: If your Honor please, can the record show that although chronologically in the record our objection comes after the view was concluded, we did in fact raise with the Court the objections we now make, and were assured over the telephone, because we were then at the scene and had not anticipated that (28) the view at 5715 Brookpark was going to take place until that moment, we were assured that we could reserve our objections and make them when we returned to the courtroom and had a reporter present? May the record show that?

The Court: The record does show it, and it may show it, and it is a correct statement.

* * * * *

(29) Mr. Day: We had assumed a view of the premises that had something to do with this case and not a view of the premises that had nothing to do with it.

* * * * *

The Court: Gentlemen, this is what the Court agrees with, as it relates to your comments, Mr. Day.

While you were away on your visit to the premises or view of the scene, the Court did receive a telephone call. Mr. Fleming told me that you had already been to the Beef & Bottle, you were about to go to 5715 Brookpark, and that counsel for the defense objected to this, and the Court ordered that you could (30) and would go to 5715 Brookpark, and I did tell Mr. Day that whatever objection he might have to that he could recite for the record upon your return to the courtroom, and that is what has been done.

What the understanding or agreement was prior to your going out there is a matter of record. It was the Court's understanding that you were going to view the scene at the Beef & Bottle and at 5715 Brookpark. I can't honestly say that it was delineated as I just delineated it. I am not saying that it was not delineated that way. I just don't recall, and I can only tell you what my impression was when the jury and you gentlemen and Mr. Birns left here and went where you went.

* * * * *

(38) Mr. Day: We will object in opening statement or in evidence to any reference to anything about the clearing house arrest except the introduction of the indictment itself. That is all that is essential to the State's case, and we may even object to that, but we think we would lose on that objection, but no others.

* * * * *

(39) The Court: You may proceed, Mr. Fleming.

Mr. Fleming: If it please the Court, the evidence will show that the defendant was a convict who was known to have been in the numbers activity.

Mr. Day: Objection.

Mr. Fleming: Specifically clearing house.

The Court: Overruled.

(40) Mr. Fleming: The evidence will further show that the police had reason to believe by virtue of information they had in their possession, as well as an investigation conducted by the Parma and Cleveland Police Departments, that this defendant's operations had extended to Parma.

Mr. Day: Objection.

The Court: Overruled.

Mr. Day: That evidence has been suppressed, your Honor, and one of the grounds was that they did not have adequate reason to believe—

Mr. Fleming: That evidence has not been suppressed, your Honor, and Mr. Day knows it.

Mr. Day: Mr. Fleming knows right now there is a ruling suppressing the evidence.

Mr. Fleming: Not the fact that an investigation was made.

* * * * *

(237) The Court: * * * You may not discuss this matter with anyone, permit no one to discuss it with you, do not discuss it amongst yourselves until such time as the case is given to you for deliberation and verdict.

I again call your attention to the subject of newspaper, radio and television. Make your best effort to avoid reading, hearing, or seeing as it relates to this particular trial, again for the (238) reason that each of the witnesses testifies here under oath. You are getting it

firsthand. Regardless of the accuracy of the media, it is still the interpretation of the writers, and the writers can't possibly be as accurate as you ladies and gentlemen here in open court.

Thank you very much, * * *

* * * * *

(495) The Court: All right. Fine. Ladies and gentlemen, we will take our lunch recess at this time. You are not permitted to discuss this matter with anyone, permit no one to discuss it with you. Do not discuss it amongst yourselves until such time as the matter is given to you for deliberation and verdict.

We will reconvene at 1:30 this afternoon.

(Thereupon at 11:45 a.m. an adjournment was taken until 1:30 p.m.)

* * * * *

(524) The Court: Ladies and gentlemen, we will enjoy our afternoon recess. I call to your attention the admonition previously given.

(Recess.)

* * * * *

(571) The Court: * * * I call your attention to the fact that you may not discuss this matter with anyone, permit no one to discuss it with you, do not discuss it amongst yourselves, until such time as the case is given to you for deliberation and verdict.

Thank you. We are adjourned.

* * * * *

DIRECT EXAMINATION OF THOMAS DEVER.

* * * * *

(624) Q. And in that connection I will ask you, sir, can you tell us what is numbers or clearing house? A. What is clearing house?

Q. Yes. A. Clearing house is a scheme of chance where a person wagers a certain amount of money, wagering on a certain number, anywhere from zero, zero, zero, to nine, nine, nine, a total of a thousand numbers. He wagers a certain amount, and if he has the winning number he gets paid the odds, generally speaking, of five hundred to one.

Q. Five hundred to one. Can he bet one penny? A. Yes, sir.

Q. And about how far up do they usually go? A. Well, from time to time there is put a limit on the amount that is bet. Sometimes it is a two dollar limit, sometimes a five dollar limit.

Q. And if a person bet five dollars and won, what would he receive?

Mr. Garmone: If the Court please, we will interpose at this point of the examination an objection. The subject matter certainly has no relevance.

* * * * *

(625) The Court: For the record, the objection is overruled.

Mr. Day: The defendant's objection to this line of questioning of this witness, in addition to its lack of relevancy heretofore indicated by Mr. Garmone, also rests on a proposition that it is prejudicial and that all that needs to be shown in (626) order for the State to make its case is that there was a pending indictment, which the record already abundantly shows.

It is the feeling of the defense, and the contention of the defense, that to go into detail simply puts this defendant on trial for another matter which is not the object of the current litigation.

* * * * *

(627) The Court: You may proceed, Mr. Monck.

Q. If a person bets five cents on a number how much would he get?

(628) Mr. Garmone: Objection. Not related to the subject matter at all, under any circumstances. The count as alleged in the indictment, and in conversation just completed at the Court bench—

The Court: Mr. Monck, it is admitted that he would join together the relevancy of the subject he is now pursuing as it relates to the case that is now before the Court.

The objection is overruled, although I hold you to your promise, Mr. Monck.

Mr. Monck: I will make it very brief, Judge.

A. If he bet five cents and had the winning number he would get paid twenty-five dollars, if it is five hundred to one, and sometimes it is reduced odds.

Q. What is the person called with whom he places the bet, if he desires to make such a bet? A. The person is called a writer.

Q. And where generally are these bets placed with writers? A. Almost anywhere.

Mr. Garmone: If the Court please, without being on my feet, and without interrupting, which is not what I want to do, I think that the defendant, through Mr. Day and myself, is entitled to have this record show a continuing objection throughout this (629) entire period of examination, through questions by Mr. Monck, and answers by Sergeant Dever.

* * * * *

The Court: The defense has a continuing objection to this line of questioning. You may proceed.

* * * * *

(634) A. Defendant Alex Birns and Edward Keeling.

Q. And what did they have with them at that time? A. In the office with them?

Q. Yes.

Mr. Garmone: Objection to any further questioning on the subject matter beyond the point of 5715, that he visited the office, and that his observation disclosed that Edward Keeling and Alexander Birns were present.

The Court must realize this—

Mr. Fleming: Objection.

Mr. Garmone: Just a minute.

Mr. Fleming: May we approach the bench?

* * * * *

(635) The Court: You may state your objection in open court.

Mr. Garmone: This matter was tried in its preliminary stage Honorable Judge Hugh A. Corrigan in this very courthouse.

* * * * *

Mr. Garmone: Anything that transpired at this address was suppressed by the Honorable Judge Hugh Corrigan, and for that reason any testimony relating to what transpired there, besides the physical setup at 5715, real property set up at 5715 Brookpark Road, is certainly not admissible, and if it would be permitted to be given to this jury would be highly prejudicial to the rights of this defendant in this case.

* * * * *

(639) The Court: * * * Will you proceed, Mr. Monck, with the thought in mind of the admonishment that I have given you, the point at which I would wish that you would stop.

Mr. Monck: Thank you very much, your Honor.

Q. Now, what was in the room with Mr. Birns and Mr. Keeling at that particular time? A. There was clearing house bet slips, two adding machines, hit and remit books, paper clips, pencils, rubber bands, paper bags, money, telephones, a couple of desks.

Q. And was Mr. Birns then arrested by the police at that place on that day? A. Yes, he was.

Q. And was he subsequently indicted by the grand jury of this county for operating a clearing house in violation of the law.

Mr. Day: Objection. It calls for (640) a legal conclusion.

Q. Was he subsequently indicted?

Mr. Day: The indictment is in evidence.

Mr. Monck: Not in this case.

Mr. Day: At the very beginning, it seems to me, we stipulated the indictment was July 28th.

Mr. Fleming: The indictment is not in evidence.

Mr. Day: The stipulation of the date of the indictment.

* * * * *

DIRECT EXAMINATON OF ALEXANDER BIRNS.

* * * * *

(719) Q. I see. And when you went there what was Mr. Keeling doing, if anything? A. May I ask the judge a question before I answer that, or ask my lawyer?

Mr. Fleming: Your Honor—

The Court: Just a moment.

Mr. Day: We will object to that, your Honor, on the ground it is not a pertinent matter before the Court. It has been established there was an arrest, it has been established there was an indictment following the arrest. The details are unimportant, irrelevant, and moreover all the evidence has been suppressed because of its illegal acquisition by the police.

* * * * *

Mr. Day: For the record, I object to any further questions along the line of other financial income, or any detail of any gambling operation, or (720) for any other source of financial income, for the reason

that defendant Birns is now under investigation by a Federal grand jury and any questions along this line might tend to incriminate him and would have the effect of forcing him to assert the privilege in open court, in effect violating the dictum of Mulloy vs. Hogan and Murphy vs. Water Front Commission, and the constitutional provisions against requiring a defendant to assert the privilege in front of a jury, or bringing it to the jury's attention.

* * * * *

(721) The Court: Ladies and gentlemen of the jury, the question generally was what was Mr. Keeling doing when Mr. Birns got there. Those aren't the exact words. There was an objection by the defense, and the objection is sustained. You may proceed, Mr. Fleming.

Q. Mr. Birns, on the 23rd of July, 1964, was this the first occasion you had to visit 5715 Brookpark Road?

Mr. Day: Objection.

The Court: Overruled.

A. I was there on a couple of previous occasions.

Q. When was the time before July 23rd that you had been there?

Mr. Day: If the Court please, may I have a continuing objection to this line of questioning on both the relevance grounds and the Constitutional grounds which I have already read into the record?

The Court: Yes.

* * * * *

(723) Mr. Day: If it please the Court, I now want a recess so I can instruct my client. I think we are getting into an area that may put him in danger of self-incrimination conceivably, and if there is any tendency to do it we are entitled to advise him. I think we are entitled to do it outside the presence of the jury.

The Court: I am conscious of the self-incrimination question, Mr. Day, but it appears to me that if the prosecution's questioning is along the line of what his income is there isn't anything improper or incriminating about it.

Mr. Day: But he is being investigated in Federal Court.

The Court: What are we supposed to do about that?

Mr. Day: He has a right to assert (724) the privilege. All I am saying is that I have a right to advise him of that, and I think I have the right to do it out of the presence of the jury.

Mr. Fleming: Before he took the stand you told someone, apparently, Friday, that you were going to put him on the stand today.

Mr. Day: I didn't tell anybody that.

Mr. Fleming: I am sorry, Jack. It was in the paper that he was going to be the first witness, but at any rate, if every time a question comes up as to whether or not he should tell the truth or take the Fifth—

Mr. Day: But these are not the only alternatives. Taking the Fifth is not necessarily juxtaposed to telling the truth. Taking the Fifth doesn't indicate untruth, and I think that if we are forced to assert the Fifth in open court it is error, but if I am forced to I will.

The Court: I don't know how you can just recess a trial so that you can advise someone not to answer a question, or advise him of his rights so that he can decide what he should answer to a question, because it wouldn't be one question, it could be a number of questions.

The only issue as I see it is that the defendant (725) has testified that he had but one source of income, namely, these businesses as he has had them down through the years, from '45 to '65, and so long as the prosecutor wants to seek questions on his income as affecting the question—

Mr. Day: I don't mind him seeking them, but we have a right to make the assertion, and I don't think we ought to put the defendant to the choice of either being advised in open court of his rights, or letting him stand naked to the wind on this kind of thing, because there is a pending grand jury investigation in Federal Court.

The Court: I understand, but the prosecution suggests to me that they would like to continue their examination.

Mr. Day: I can assure you, if I have to say it in open court, he is not going to get what he is after, and what he does get is the ill effect on the defendant of asserting the privilege, which I say is an unconstitutional objective.

* * * * *

(726) The Court: I am going to overrule your objection and have a brief recess.

* * * * *

(728) The Court: Please proceed, Mr. Fleming.

Q. Now, on the first occasion when you went there did you take something with you, other than money?

Mr. Day: Objection, if the Court please. Again I want to make a continuing objection.

The Court: The question was answered yes, I am sure.

Mr. Day: He said on the first occasion.

Mr. Garmone: The question was never asked about the first occasion.

Mr. Fleming: I am asking now.

The Court: Excuse me. You are objecting to the question?

(729) Mr. Day: I am objecting to the question, and while I am on my feet, sir, I think any question which goes to the specifics of July 23, 1964, and that particular arrest is not proper because that evidence has been suppressed and stands suppressed in this

Court now, and no fruit of that illegal search can be utilized by the prosecution for any purpose, and I want the record to reflect my view on that score, and the position of the defense.

The Court: Is there something different about your objection now as opposed to the objection that you made previously? I understand your point, and you have a continuing objection on that point.

Mr. Day: Out of a superabundance of caution I was delineating my objection.

The Court: As it relates to your objection to this question it is overruled, and your general continuing objection is noted in the record.

Mr. Day: It is noted in the record, and the same reasons apply to the continuing objection, if the Court please.

The Court: Yes. I am going to permit questions on the basis of credibility, Mr. Day. You may proceed, Mr. Fleming.

* * * * *

(730) The Witness: I have a tax investigation pending at this time. I am certainly not going to answer him any questions in reference to these things.

The Court: Mr. Birns, let us understand something. You can't ask me a question.

The Witness: I will refuse to answer the question, then.

The Court: And I can't give you any answers, but you have a perfect right to refuse to (731) answer questions as you see fit, that may be asked by Mr. Fleming.

The Witness: I refuse to answer the question.

Mr. Monck: On what grounds?

The Court: What is the reason that you refuse to answer the question?

The Witness: Because there is a tax investigation at the present time and I refuse to answer these questions because they may tend to reflect on that tax investigation.

The Court: In other words, incriminate you?

The Witness: That is correct.

The Court: All right, Mr. Fleming. Does that answer your question, Mr. Monck?

Mr. Monck: Yes. Thank you, Judge.

Q. On the second occasion that you went there did you take anything with you other than the money? A. I answered that question, I believe. Didn't I answer that question?

Q. We were talking about the first occasion. A. Well, I would refuse to answer any questions in regard to that situation on the grounds that it may tend to incriminate in this present tax investigation.

(732) Q. I see. And I would imagine that you would refuse to answer what you did on the third occasion for the same reason; is that correct? A. I refuse to answer that question on the same ground.

Q. But you did go there on the three occasions to loan Mr. Keeling some money, didn't you? A. I'll refuse to answer any question in reference to that.

* * * * *

(799) Q. And these two companies are connected to each other? A. Port Wellington Quarries supplies the Ontario Stone their stone in this part of the country.

Q. I see. Now, for which of these companies do you work? Do you work for Port Wellington or Ontario? A. I refuse to answer that.

Q. On what basis, sir? A. Because I have an investigation by the Internal Revenue Department at this time pending and I am not going to go into that. The monies that I have received there reflects on my income tax.

Mr. Fleming: Your Honor, I can't see anything incriminating about that last question.

* * * * *

(814) Q. Mr. Birns, some reference has been made here by both sides, that is, counsel for the defense and the prosecution, (815) with regard to motion to suppress. You were there, weren't you? A. Yes, sir.

Q. And you were present in the courtroom when Mr. Keeling said that he was operating some tapes with regard to clearing house, under oath, weren't you?

Mr. Garmone: Objection.

The Court: What is the basis of your objection?

Mr. Garmone: Objection for the record this time, and ask the Court to rule on it.

The Court: You can answer that question yes or no. Were you in the courtroom when that hearing was had on that motion?

* * * * *

(840) The Court: * * * we will recess at this time for the evening.

I call to your attention the fact that you may not discuss this matter with anyone, permit no one to discuss it with you, do not discuss it amongst yourselves until such time as the case is given to you for deliberation and verdict.

Thank you for your patience. You are excused.

* * * * *

DIRECT EXAMINATION OF THOMAS DEVER.

* * * * *

(877) Q. And what, if anything, do brown paper bags have to do with the operation of clearing house?

* * * * *

(878) (Pending question read.)

Mr. Day: Objection.

The Court: Overruled. You may answer.

A. Brown paper bags are used to carry clearing house bet slips to a clearing house office. They are also used to

store the bet slips for three days after the current date, at the clearing house, in either foot lockers or metal tool cabinets.

Q. And why are paper bags used?

Mr. Garmone: Objection, if the Court please.

The Court: Objection is overruled.

Mr. Garmone: I would like the record to show that I am now making a motion that the Court declare a mistrial in this matter.

The Court: Motion is overruled, Mr. (879) Garmone.

A. Paper bags are used because the bet slips they contain are destroyed at the end of three days, and the paper bags are easily destroyable.

Q. Would you tell us about the size of the bag you saw Mr. Birns carrying? A. Well, it was about a five or ten pound paper bag.

* * * * *

(883) Mr. Day: * * * and in addition I should like the Court to note that we are raising and saving for the record the proposition that when the prosecution proceeded to question the defendant Birns about matters which at side bar, had they been advised about necessitating the invocation of the Fifth Amendment, the defense claims, and is claiming, and has not abandoned the claim, that due process (884) of law was violated in their persistence in a course which they knew could do no other than result in his being forced to assert the privilege before the jury.

* * * * *

The Court: * * * This motion similarly is overruled.

Mr. Day: * * *. The defense renews each motion for mistrial heretofore made and heretofore overruled in this case for the reason that the chance for a fair trial was

foreclosed with the insistence of the plaintiff in proceeding to ask questions which forced the defendant Birns to invoke the privilege against self-incrimination in the face of a clear warning side bar that there would be no other course open to him for reasons of contravention of due process of law.

The motions for mistrial are also founded on (885) the proposition that there has been inadmissible evidence, properly objected to and overruled, on the question of the details of the alleged crime of July 23, 1964, it being the position of the defense that nothing more was requisite to the trial of this case than the introduction of the indictment for that particular offense, and an indication of the place of security of the evidence in that case.

It is the defense's position that any reference to any of the evidence in the so-called policy case, the case which grew out of the arrest of July 23, 1964, and the indictment of July 28, 1964, any reference beyond those that I have just noted violates the proposition that the fruit of a poisoned tree, namely, the illegal search and seizure, the unlawful acquisition of evidence in the case which resulted in the indictment in 72,864, is inadmissible and subject to both motion to suppress and/or strike.

The Court: The Court has spoken on the subject that you mention now, and I will repeat briefly, Mr. Day, the Court feels that something beyond the indictment of March 23rd is necessary.

It is necessary as it relates to that alleged offense of July 23rd, that the prosecution show the participation of Detective Bennett in that July 23rd (886) event for the reason that the charge or several counts of the indictment now pending in this court relating to bribery stem from this so-called clearing house operation, and to that extent the Court has allowed evidence of the clearing house case,

and we have attempted to maintain a fine line without retrying the clearing house case.

As it relates to your renewal of each motion for mistrial, the same is carefully noted in the record and your request at this time is overruled.

Mr. Day: May the record show, so that it does not appear that we have abandoned any objection to the admission of the evidence, we claim that the admission is prejudicial error under the law of the State of Ohio.

The Court: The record will so indicate.

* * * * *

(1184) Morning Session, Tuesday, January 4, 1966.

The Court: The defendant has filed a motion for a new trial; the first branch of that motion relates to timing of publicity respecting the defendant's indictment by a Federal grand jury and the allegation that this publicity prevented a fair trial. We heard argument yesterday on this subject.

The Court has made an independent research of the applicable law, and the Court is prepared at this time to rule on that particular branch of the motion. I point out "that particular branch of the motion." There are five other branches still to be argued, still to be considered, still to be ruled upon.

The Court is of the opinion that the media, whether it be newspaper, radio or television, reported only facts which were elicited at the trial, which reporting was concise and accurate, and the reporting was made and done only as to evidence that was adduced on a daily basis in the trial; that is to say, nothing was reported prematurely.

* * * * *

(1186) The Court is of the opinion that, as it relates to this subject of publicity, the defendant was accorded a fair trial.

Mr. Day, if you will continue now with your argument as it relates to the other branches of your motion.

* * * * *

(1211) Mr. Day: * * * In the prosecution's effort to deal with a charge which was not on trial they, in effect, as I suggested, tried the man for a crime that he was not indicted for, and this offends due process, and there is a case pretty much on the question and that is Cole vs. Arkansas, 333 U. S. 196, decided in 1948.

Moreover, the rule on suppressed (1212) evidence is not that it shall not just not be used direct, but that it shall not be used at all. It can't be used directly and it can't be used indirectly.

* * * * *

(1213) Mr. Day: I have implied, without actually saying so, now I'll remove the implication and say so directly, that the Court erred in certain rulings on the admissibility of evidence.

Now, I have addressed this to particular parts of the evidence, without meaning thereby to waive any other objection that I may have saved in the record, but when Detective Sergeant Dever was allowed to testify at extreme length on the method and technique of operating the numbers game, that was gross error. That had no relevance to anything that was properly on trial in this case, and, standing alone, is a basis for upsetting the conviction.

* * * * *

(1223) I have also talked about allowing matter in evidence which, in effect, tries the defendant on another charge which is not laid in the indictment. We charge that as a specific error on the part of the Court, * * *.

* * * * *

(1237) Monday, January 10, 1966.

The Court: This is case number 81317, entitled State of Ohio vs. Alexander Birns.

* * * * *

The defendant, as a matter of right, has now filed a motion for a new trial. The motion contains some six branches. The first branch relating to publicity was previously ruled upon by the Court. That branch was overruled.

We are here this morning for a ruling as it relates now to the other five branches of the motion.

The motion for a new trial, as it relates to all branches, is overruled.

* * * * *

EXCERPTS FROM COMMON PLEAS RECORD ON MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE, CASE NO. 81,317.

(585) Friday Morning Session, May 6, 1966.

The Court: This is Case No. 81317, the State of Ohio versus Alexander Birns. The defendant has filed a motion for a new trial based on newly discovered evidence. Now, such motions are directed to the sound discretion of the court * * *. To grant a motion for a new trial based on newly discovered evidence, it must appear to the court that the verdict on another trial would be different.

The issue in this case, and the issue is relatively simple, is whether or not an admitted fact that an automobile accident occurred, and the admitted fact that it was not reported at the time of the trial to the jury, would be fatal to the prosecution; or, stated in other words, had the jury known of the accident, would a different result have obtained.

The court is of the opinion that this is not (586) so; the same result would have obtained.

Based on that fact, the court overrules the defendant's motion for a new trial based on newly discovered evidence.

* * * * *

MOTION FOR NEW TRIAL, COMMON PLEAS CASE NO. 81,317.

Now comes Defendant Alexander Birns, through his Counsel and moves the court for a new trial in this cause for the following reasons:

(1) The timing of publicity respect the defendant's indictment by a Federal Grand Jury which prevented a fair trial.

* * * * *

(5) Errors of law by the Court occurring at the trial prejudicial to the defendant in:

a. Rulings on the admissibility of evidence.

b. Denying defendant's motions to suppress.

c. Denying defendant's motions for a mistrial.

d. Denying defendant's motions for a directed verdict or direction to the jury to return a verdict for the defendant.

e. Denying defendant's motions to strike.

* * * * *

j. Allowing questions by the prosecution designed to force the defendant to assert the privilege against self-incrimination after the prosecution and court had been advised of the eventuality.

k. Ruling in a manner which deprived the defendant of rights under the Fourth, Fifth, Sixth and

Fourteenth Amendments to Constitution of the United States and comparable sections of the Ohio Constitution.

* * * * *

m. Allowing evidence of other charges against the defendant which had the effect of trying him on charges not laid in any count of the indictment for which he was on trial, contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

* * * * *

The support for the foregoing grounds for a new trial will be detailed in a brief which will be presented at the time for hearing on the motion.

Respectfully submitted,

FRED W. GARMONE,
JACK G. DAY,
Counsel for Defendant.

EXCERPTS FROM ASSIGNMENTS OF ERROR IN THE COURT OF APPEALS OF OHIO, EIGHTH DISTRICT, CUYAHOGA COUNTY, FIRST APPEAL, NO. 27,812.

No. 2. The trial court erred in controlling and administering the trial and interpreting the law in contravention of the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 14, and 16 of the Ohio Constitution in the following particulars.

(a) In allowing extensive testimony about the numbers racket and defendant's relationship to it.

(b) In permitting the jury to view the premises at 5715 Brookpark Road, which view had nothing

to do with the understanding of events at the Beef and Bottle Restaurant, the situs of the only events of explanatory relevance to this case.

* * * * *

(d) In allowing the prosecution to ask questions deliberately designed to force the defendant to invoke the privilege against self-incrimination in the presence of the jury.

* * * * *

No. 6. The trial court erred in overruling defendant's motion for a new trial based upon:

(a) Prejudicial publicity respecting defendant's indictment by a federal grand jury which publicity occurred after argument in the present case had begun.

* * * * *

MOTION FOR NEW TRIAL, NEWLY DISCOVERED EVIDENCE, COMMON PLEAS CASE NO. 81,317.

Now comes the Defendant pursuant to R. C. 2945.79 (F) and, through his counsel, moves the court for a new trial on the basis of newly discovered evidence material to the defendant.

The reasons such evidence was not discoverable in the exercise of reasonable diligence and was unavailable to the defendant at the time of trial will appear from the attached, supporting brief and exhibits.

Respectfully submitted,

JACK G. DAY,
Counsel for Defendant.

EXCERPTS FROM ASSIGNMENT OF ERROR IN THE COURT OF APPEALS OF OHIO, EIGHTH DISTRICT, CUYAHOGA COUNTY, APPEAL FROM ORDER OVERRULING MOTION FOR NEW TRIAL ON GROUNDS OF NEWLY DISCOVERED EVIDENCE, NO. 28,002.

A. The Trial Court Erred in Refusing to Grant the Motion for a New Trial on the Basis of Newly Discovered Evidence Because

(1) Evidence developed at the hearing on the motion exposed suppression of evidence by either the prosecution or the police department of Parma or both and false testimony on behalf of the state.

* * * * *

OPINION OF THE COURT OF APPEALS OF CUYAHOGA COUNTY, CASE NO. 27,812 and 28002.

Syllabus.

1. The defense of entrapment is not available to a defendant who creates is his own mind (without inducement by another seeking to entrap him into committing an unlawful act) the purpose to commit a criminal act and acts in furtherance of his own purposes. *State vs. Gutilla,* 94 Ohio App. 469.

2. Where the testimony of the defendant clearly supports in almost complete detail the necessary elements of the crime or crimes charged against him, the claim that the verdict is not supported by sufficient evidence cannot be maintained.

3. Where upon trial of a motion for a new trial on the ground of newly discovered evidence, it being claimed that the state suppressed or concealed evidence, which if

known to the defendant could have been used to challenge the credibility of a state's witness, and when the court, in overruling such motion, finds that the use of such evidence would not in all reasonable probability require or produce a different result, especially where in such case the defendant's testimony in great part supports and is not in serious conflict with the testimony of the witness whose testimony it is sought to impeach, as well as the testimony of other state's witnesses upon which the defendant was found guilty, it does not constitute error to overrule such motion.

SKEEL, *J.*

These appeals come to this Court on questions of law from a judgment entered by the trial court on the verdict of a jury finding the defendant guilty on both counts of an indictment charging him with bribery and unlawfully attempting to corrupt a witness in the discharge of his duties as a witness and as an officer of the law in the case of State vs. Birns with intent to obstruct and impede or attempt to obstruct and impede the due administration of justice.

The defendant claims the following errors:

1. In repeatedly ruling on evidence and procedure, in making comment prejudicial to the defendant in the presence of the jury, and in invading the province of the jury.

2. In controlling and administering the trial and interpreting the law in contravention of named provisions of the Federal and State Constitutions.

3. and 4. In refusing defendant's request to charge and for errors in the general charge.

5. In prohibiting defendant in defendant's final argument to claim entrapment and the court's failure to give requested charge on that subject.

6. and 7. In overruling defendant's first motion for new trial and for failure to direct a verdict for defendant.

8. and 9. The verdict is contrary to law and is not sustained by sufficient evidence, and, by separate appeal, in overruling defendant's motion for new trial based upon a claim of newly discovered evidence.

The facts as shown by the transcript, the bill of exceptions and exhibits, are that the defendant was arrested on July 23, 1964 at 5715 Brookpark Road in the City of Parma, Ohio, and charged with promoting a numbers game or lottery known as clearing house in violation of Section 2915.13, Revised Code. The case as thus charged was pending for trial on the merits on November 20, 1964.

On November 20, 1964, the defendant testified he was at the "Beef and Bottle" (a lounge bar in Parma which the record shows the defendant patronized on frequent occasions) having dinner with a girlfriend and upon leaving he saw Detective Bennett seated at the bar. He, the defendant, testified that he had only seen the officer once or twice before, one of which occasions was at the time of his arrest on July 23, 1964. After the defendant recognized the police officer, he engaged him in a conversation for more than a half hour on the subject of gambling. As set out in defendant's brief:

"There ensued an exchange of conversation and drinks during which the subject of gambling was discussed * * *. Defendant told Bennett that the Cleveland Press ran the requisite information to determine the

winners in clearing house but only in editions delivered on the east side of town. * * *."

Defendant testified that the officer was amazed to know that he (Birns) was correct in his statement and that the defendant offered to demonstrate the truth thereof by bringing out papers for the officer to examine purchased at several locations. Defendant then arranged that he would call the officer the following week and bring the papers with him to demonstrate the truth of his statement. The meeting was to be at the Beef and Bottle.

The defendant called Detective Bennett at the station house on Monday (November 23, 1964) at about 3:00 P.M. and said he had the newspapers. They agreed to meet at the Beef and Bottle at about 7:45 P.M. Detective Bennett, with Detective Eschweiler, then equipped themselves with sound equipment to record the conversation between the defendant and Bennett, Eschweiler to listen in his automobile at the side of the restaurant and to attempt to record the conversation on a tape recorder. When the defendant reached the restaurant on November 23 at about 8:15 P.M., Bennett was sitting at the bar. The defendant testified that they had five, six or seven drinks and that he showed the newspapers to Bennett who was amazed. The defendant expressed his philosophy on the subject of gambling, that is, that it was not morally wrong to gamble, and that everybody engages in such conduct. After continuing the conversation, the defendant testified Bennett said:

" 'You know' he says, 'I have got four and a half or five and a half kids and I'm only making $6500 a year.'

Defendant further testified:

"That didn't sound good to me. I thought maybe at that moment, why would he tell me—I'm thinking

like this, why would he tell me he has got five and a half kids and making $6500 because there was nothing incriminating said, in all my conversation at the bar and I was wondering about that and I then sent for the waitress to bring a menu because I didn't have dinner yet and when the waitress brought the menu, just trying to be polite, I says 'Mr. Bennett, I am going to eat. Would you care to eat or dine with me?' He said, 'Yes, I would love to.'
* * *"

When the salads were on the table, the defendant stated:

"I went first. Mr. Bennett came about twenty to twenty-five seconds later. He came to the table and sat down. * * * Well when he sat down, then I was thinking about his five and one half kids that he mentioned and only making $6500 a year. I says 'Look, here is a Christmas gift for your family so they will have a nice Christmas.' He looked at me and he says 'Gee.' He hesitated. He says 'Gee Whiz. What am I supposed to do for this?' I says 'Nothing.' I says 'I wouldn't want you to jeopardize your family or your kids or your job.' "

The defendant testified he laid the two hundred dollars on the table for Bennett. He also testified that after some general conversation that Bennett went to the men's room. After he came back, he laid the money on the table and said "Now, Shon, tell me what you want me to do for this two hundred dollars." The defendant answered "Nothing. I have told you before that I didn't want you to jeopardize your family, your job or your kids." When pressed further as to what was expected of the police officer who, under the circumstances, was not satisfied with defendant's explanation, defendant said "Look, if you can be helpful O.K." After further con-

versation on this subject, a man walked slowly toward the table and Bennett said "Hello Frank—are you working tonight?" (This was Eschweiler.) The defendant then testified that all this didn't look good to him. He said "Look, I am getting out of here." He got his coat to leave and was then arrested.

The testimony of the defendant in attempting to explain how he came to give Bennett two hundred dollars (as an alleged Christmas gift on the 23rd of November, with Christmas more than a month away) when he knew that Bennett (an almost total stranger to him) was a potential or probable witness for the State in the numbers case then pending against him, was, with the exception of a few minor details, completely corroborated by Bennett. The officer's testimony on the discussion about his family was to the effect that he had just taken pictures of his children which he displayed to Birns who then inquired about his family. Bennett, besides his work as a police officer, was in the photography business with his wife in Parma.

On the state of the record, including Birns' testimony, the issue of the defendant's guilt on either or both charges is clearly supported. The purpose of the defendant in giving one known to him as a police officer who participated in his arrest on a numbers charge, which case was then pending for trial on the merits, it being undisputed that until his arrest, the officer was a total stranger to him, and where there was no indication or the slightest suggestion of solicitation, for one under such circumstances to seek the company of the officer for the purpose of explaining his philosophy on the subject of gambling and without more, give such officer two hundred dollars in cash, with the statement "Look, here is a Christmas gift for your family so they will have a nice Christmas"

is sufficient to support a guilty verdict. This evidence being given by the defendant (who has served time in a tax evasion case and in a number of other cases) also disclosed that the officer was taken by surprise when the money was offered, when he, the defendant, testified: "He looked at me and he says 'Gee.' He hesitated. He says 'Gee Whiz. What am I supposed to do for this?' "

On the face of such a record, the defendant's claim of error No. 5 must be overruled, there being no evidence to suggest even entrapment. The court was correct in refusing to charge the law on that subject. Also, for the reasons set out above, claimed errors Nos. 6, 7, 8 and 9 must be overruled.

The defense of entrapment is not available to a defendant who creates in his own mind (without inducement by another seeking to entrap him into committing an unlawful act) the purpose to commit a criminal act and acts in furtherance of his own purpose. *State v. Gutilla*, 94 Ohio App. 469.

Assignment of error No. 1 is concerned with matters of procedure.

In considering the fact situation, the conclusions reached are based not only on the testimony of Detective Bennett, corroborated by the defendant's testimony, but also that of Officer Eschweiler, who had been assigned to the duty of listening to the conversation between the defendant and Bennett over certain electronic equipment. After the defendant had insisted on carrying on a discourse on gambling with an arresting officer in the numbers case, the police officer involved, either with or without the orders of the Chief of Police of the City, but at least with his knowledge and consent, took steps to use the electronic device of the City for transmitting conversations to others at a distance. Bennett concealed the

transmitter on his person and the receiver, with a tape recorder, was placed in Eschweiler's personal automobile which was parked near the Beef and Bottle Restaurant on Pearl Road. The testimony is uncontradicted that the conversation between Birns and Bennett was clearly received and understood by Eschweiler but that the tape recording was garbled and not understandable because of the use of improper equipment. It picked up street noises and the police radio. The jury was permitted to hear the tape with the use of earphones so that they were completely informed as to the conditions of the tape.

One other factor brought out in the record is that when Birns was arrested on July 23rd, there was, in the place where he was arrested, equipment used in conducting a numbers lottery, including tapes and money found in Birns' hat. Such property was not offered or received in evidence in this case. There is no doubt but that Birns brought into the case the matter of his involvement in numbers operations so that evidence as to the manner in which such a lottery is operated was clearly proper.

On the motion for new trial because of newly discovered evidence, it was disclosed that while Detective Eschweiler was in his private automobile listening to the conversation between Detective Bennett and the defendant, one Donald E. Hale, driving his automobile on Ridgefield Road, ran into and struck the automobile in which Eschweiler was seated listening to the Bennett-Birns conversation. Eschweiler got out of his car, talked with Hale about the damage, and testified that he called the station for an officer to investigate the accident and that Officer Henry Gabriel responded in a very few minutes and took charge of the investigation as is shown by said Officer's activity report filed in the Parma Police Department November 23, 1964.

The basis of this motion for new trial is that the State did not bring the incident of this collision to the attention of the defendant, thereby depriving him of due process. Such claim is based on the alleged fact that since Eschweiler's testimony was corroboratory in character and as the evidence of the defendant tends to show that the accident happened while Eschweiler was listening to Birns and Bennett over the electronic transmitter, and that he left his listening post in his automobile for from twenty-five to forty-five minutes to investigate the accident, if the fact of the accident had not been concealed, it could have been presented to the jury to challenge Eschweiler's credibility. The State's evidence, as shown by many reliable factors, is that Eschweiler did not leave his listening post for a period of time not to exceed five minutes and that the parts of the conversation to which he testified, he had heard over the transmitter. The court, in overruling defendant's motion for a new trial on the ground of newly discovered evidence, stated that the facts as it found them to be if presented to the jury, would not within reasonable probability cause the jury to come to a different result. The credible evidence on the collision, as shown by the record, clearly supports such result.

One other factor requires this result. The defendant's testimony is not in serious conflict either with that of Bennett who participated in the conversation with Birns or that of Eschweiler who listened over the broadcasting equipment. In addition to what the defendant testified on direct examination, as above set out, he testified on cross-examination as follows:

> "Q. My question is this, sir: When you bought those papers did you buy them so that you could take them to the Beef & Bottle and show them to Detective Bennett?

"A. That is correct.

"Q. That was the only reason—you bought them?

"A. That is right.

"Q. And on the night in question when you came in the Beef & Bottle with those newspapers under your arm, your intention was to show these papers to Bennett and explain them to him with regard to the clearing house digits; is that correct?

"A. I brought those papers out to show him that his area didn't carry it and the other area did.

"Q. I see. At that time did you have any intentions of giving him a Christmas present?

"A. No.

"Q. When you went inside the bar and saw him there at the bar, and discussed with him showing him the manner the number was picked, the stocks and bonds, and so forth, at that time did you have any intentions of giving him a Christmas present?

"A. No.

"Q. How much money did you take with you when you went there?

"A. You mean how much money do I carry with me?

"Q. My question is, how much money did you have in your pocket on the 23rd of November, 1964, when you went to the Beef & Bottle to meet Detective Bennett?

"A. Well, I don't recall exactly what I had, but I had money with me.

"Q. Can you approximate how much money you had in your pocket?

"A. I could have had four or five hundred dollars.

"Q. Four or five hundred dollars?

"A. Yes.

"Q. Now, the twenty tens that you gave Detective Bennett, did you have them in a bundle?

"A. I had them with my other money.

"Q. But did you have this separated from your other money?

"A. No, sir.

"Q. Then when you gave Detective Bennett this money how did you know you gave him two hundred dollars?

"A. Well, he wasn't at the table. I proceeded to the table first. It took him about twenty to twenty-five seconds to come back after that, and the only reason I done that is when he started telling me that he had four and a half or five and a half kids, and only—emphasized the word 'only'—making sixty-five hundred dollars a year.

"Q. No, my question is this, sir: I believe the testimony is that you threw twenty ten dollar bills to Detective Bennett there at the table. Now, you have told us that you had about five hundred or some odd dollars in your pocket. When did you separate the two hundred dollars that you gave Bennett in the Beef & Bottle, if at all?

"A. Well, I just told you that I got to the table first.

"Q. What did you do when you got to the table first?

"A. I went into my pocket and counted out two hundred dollars.

"Q. I see. In other words, at that point, when you were there at the booth and as Detective Bennett was behind you—

"A. Not as Detective Bennett was behind me. He was at the table yet.

"Q. But you don't know where he was?

"A. He could have been giving a few more signals. I wouldn't know.

"Q. Well, let's understand each other.

"A. I understand.

"Q. You and Detective Bennett were standing at the bar; is that correct?

"A. We were.

"Q. And you left the bar first and went to your booth; is that correct?

"A. I can explain that to you, too. When I got—I'm going to explain it so you understand. I just can't give you a yes answer. I want to explain it.

"Q. Go ahead.

"A. We was at the bar. We had our five or six drinks. I was through having conversation with him at that time. I ordered some food from the waitress, and only out of politeness I asked him would he care to have something to eat. That is all there was. He had not accepted the food you would never have heard anything about this, but before I got to the table he started telling me about his family and his kids, and to me, the way he said it, 'I'm only making sixty-five hundred dollars a year,' to me it looked like a beg.

"Q. I see. At any rate, when you left the bar first to go to your booth, that is when you separated the money?

"A. That is when I counted the money out.

"Q. Yes. And you don't know where Detective Bennett was at that time because your attention was directed to counting the money, wasn't it?

"A. No, I didn't see him in my presence. I didn't count the money in his presence because he wasn't there.

"Q. And then when you sat down did you have this money in your hand or had you put it back in your pocket?

"A. I had that money in my hand.

"Q. And you held this money in your hand during the time of the preliminary conversation with Detective Bennett at the booth?

"A. No. Just a minute. When he sat down, the salads are on the table. That is when I took the money and I laid it down on the table. I said, 'This is a Christmas gift for your kids and your wife. See that they have a nice holiday,' because I didn't know he had five and a half kids and only making sixty-five hundred dollars, unless he told me. I thought it was

a beg, so I thought it was holiday time, so I says, 'Here, have your family have a nice Christmas.' There was nothing said at the bar in reference to anything incriminating, but when he got that money, that is when all his—the things started."

As thus stated by the defendant, it is clear that the State's case is supported by the defendant's own testimony and upon such evidence, the case was correctly submitted to the jury. The absence of Eschweiler from his listening post for five minutes or less, when the conversation covered a period of time from about 8:15 to 9:30 P.M., was not, upon the record as above stated, a factor preventing defendant from being afforded due process according to law. The motion for a new trial on the ground of newly discovered evidence was, therefore, properly overruled.

For the reasons stated, the judgments are affirmed.

CORRIGAN, *P.J.* concurs.

WASSERMAN, *J.* concurs in the judgment only.

JOURNAL ENTRY OF THE COURT OF APPEALS OF CUYAHOGA COUNTY, CASE NOS. 27,812 and 28,002.

This cause came on to be heard on the appeal on questions of law from the judgment of the Court of Common Pleas, and was argued by counsel for the parties; and upon consideration of all of the errors assigned, the Court finds no error prejudicial to the appellant and therefore the judgment of the Court of Common Pleas is affirmed. See opinion. It is ordered that appellee recover of the appellant its costs herein expended.

It is further ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Appellant excepts.

NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO, COURT OF APPEALS NOS. 27,812 and 28,002.

The appellant, defendant in the Common Pleas Court, hereby gives notice of appeal to the Supreme Court of Ohio from a judgment rendered by the Court of Appeals of Cuyahoga County, Ohio, on the ___ day of _____, 1967 affirming the judgment of conviction of the appellant for a felony.

Said appeal is on questions of law, involves substantial constitutional questions, and is taken to the Supreme Court of Ohio:

(a) Upon appeal of right, based on violations of the Due Process clause of Amendment XIV to the Constitution of the United States;

and

(b) On condition that a motion for leave to appeal, this being a felony case, be allowed by the Supreme Court of Ohio.

JACK G. DAY,
Counsel for Defendant-Appellant.

EXCERPTS FROM DEFENDANT-APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION IN THE SUPREME COURT OF OHIO, CASE NOS. 41,013 and 41,014.

QUESTIONS OF LAW PRESENTED.

I.

Were Amendments IV and XIV of the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution violated when the trial court permitted a view of the scene and extensive testimony relating to evidence suppressed in another case and the Defendant-Appellant's activity in that case?

The Court of Appeals answered the question "NO." Defendant-Appellant contends the question is properly answered "YES."

* * * * *

III.

Were Amendments V, VI, and XIV of the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution violated when the trial court allowed the prosecution to ask the Defendant-Appellant questions unrelated to the issues on trial in order to deliberately force him to invoke the privilege against self-incrimination in the presence of the jury.

The Court of Appeals did not answer the question. Defendant-Appellant contends the question is properly answered "YES."

IV.

Were Amendment XIV of the United States Constitution and Article I, Section 16 of the Ohio Constitution violated by prejudicial publicity, accumulating during the trial and capped by a final lurid headline, respecting Defendant-Appellant's federal indictment for perjury, occurring after final summation on the trial of the present case had begun.

The Court of Appeals did not answer the question. Defendant-Appellant contends the question is properly answered "YES."

V.

Were Amendment XIV of the United States Constitution and Article I, Section 16 of the Ohio Constitution violated when the prosecution and police suppressed the fact that while a detective, a state corroborating witness, was allegedly in an automobile monitoring a conversation

which the State claims is the prime basis for the charge against the Defendant-Appellant, the monitoring automobile was struck by another and the detective was out of the automobile for a period during which he had represented to the jury that he was carrying on monitoring activity?

The Court of Appeals did not meet the constitution question squarely. The Defendant-Appellant contends the question is properly answered "YES."

VI.

Were Amendment XIV of the United States Constitution and Article I, Section 16 of the Ohio Constitution violated when the trial court failed to make finding beyond a reasonable doubt that the suppressed information would not have caused the jury to reach a different result?

The Court of Appeals did not consider the precise question but apparently considered it constitutionally adequate to find that "within reasonable probability" the jury would have come to "a different result." The Defendant-Appellant contends the question is properly answered "YES."

ORDER OF THE SUPREME COURT OF OHIO DISMISSING APPEALS, CASE NOS. 41,013 and 41,014.

(Entered June 28, 1967.)

These causes, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeals for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTIONS FOR LEAVE TO APPEAL, CASE NOS. 41,013 and 41,014.

(Entered June 28, 1967.)

It is ordered by the Court that these motions are overruled.

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING, CASE NOS. 41,013 and 41014.

(Entered July 26, 1967.)

It is ordered by the court that rehearing in these cases be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 753.

ALEXANDER BIRNS,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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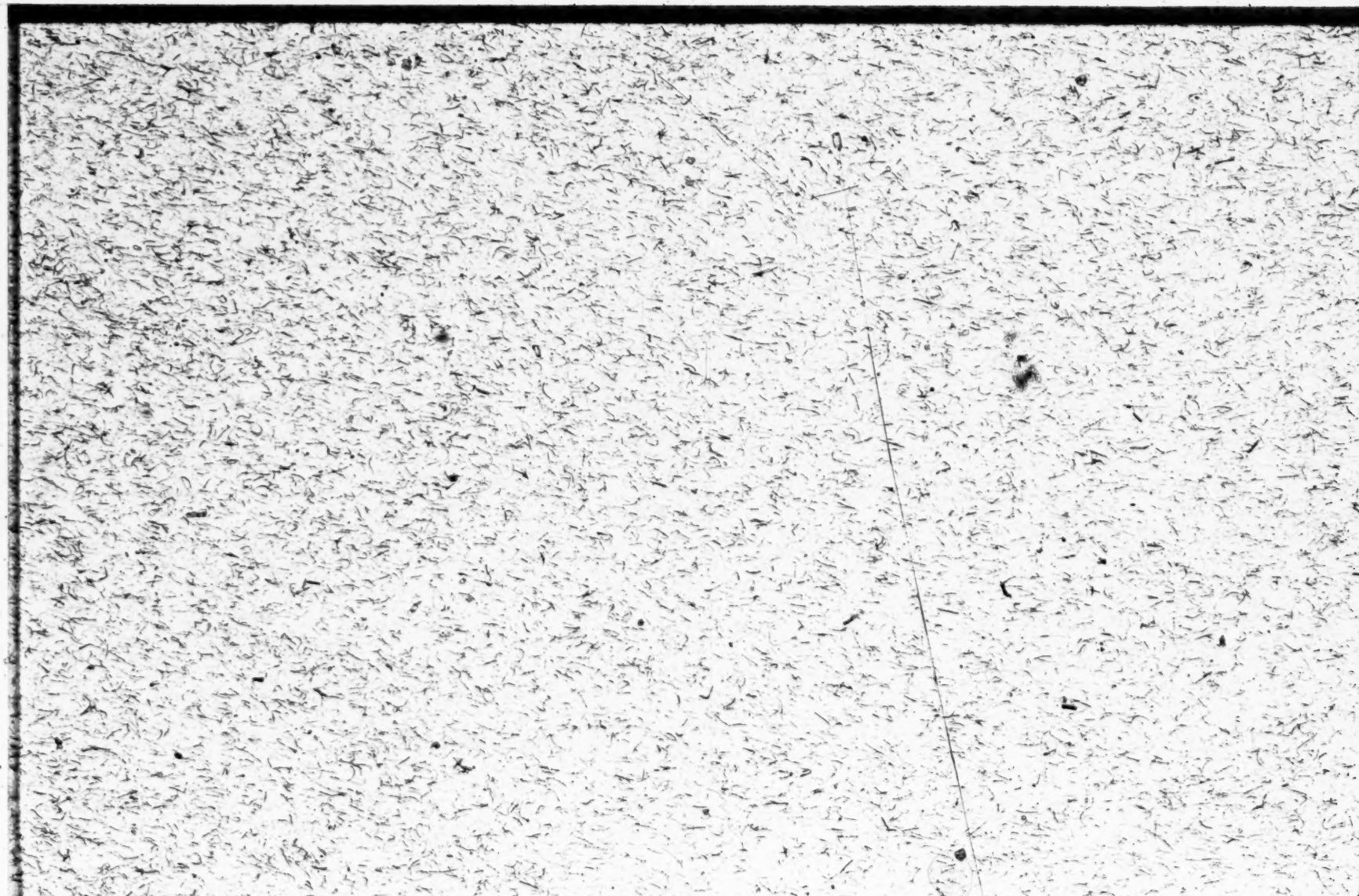

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 753.

ALEXANDER BIRNS,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION.

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals for Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed in an opinion, 10 Ohio App. 2d 103, 226 N. E. 2d 149. The Supreme Court of Ohio refused leave to appeal and dismissed an appeal as of right for the reason that no substantial constitutional question exists in this case.

The Ohio courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is therefore presented by the petition for certiorari.

QUESTIONS PRESENTED.

The "Questions Presented" in the petition do not accurately present questions raised by the record and by the opinion and judgment of the Court of Appeals. Respondent submits that the subject matter of petitioner's questions would be more properly stated as follows:

I. In a trial for bribery of a police officer and for attempting to influence the officer as a witness in another case, was the petitioner denied a fair trial by the admission of testimony as to evidence that had been suppressed in the other case where petitioner had injected such subject matter into the trial and it is not probative of the guilt of the accused on the bribery and witness tampering charges?

II. When a corroborating witness who listened to the bribe offer said that he actually overheard all that he had testified to overhearing and there is no evidence that his testimony was false and defendant's testimony is not in serious conflict therewith, was the petitioner denied a fair trial by the fact that the jury did not know that the witness had been absent from his listening post for five minutes?

III. Were the petitioner's right of confrontation and right against self-incrimination violated in cross-examination of petitioner?

IV. Where the accused initiated publicity two days after his arrest by voluntarily using the public media to advance his claim that the payment of the money was a gift, was the petitioner denied a fair trial by a newspaper article concerning a federal indictment for perjury in an income tax matter returned while petitioner's trial was in progress?

V. Did the trial court's application of the state standard for determining a motion for a new trial on the ground of newly discovered evidence deprive the petitioner of due process of law where no constitutional error exists and the State's case is supported by the defendant's own testimony?

STATEMENT OF THE CASE.

Alexander Birns was indicted on two counts—bribery and attempt to influence a witness. He was tried to a jury and convicted on both counts, which charged that on or about November 23, 1964 he did

> (1) unlawfully and corruptly offer and give $200.00 to Clarence Bennett, a police officer of the City of Parma, with intent to corrupt and influence Clarence Bennett with respect to the discharge of his official duty as a police officer and/or to influence Clarence Bennett with respect to his action or judgment on matters pending or that might legally come before him as such officer involving said Alexander Birns;
>
> (2) unlawfully and corruptly attempt to influence Clarence Bennett, a witness, in the discharge of his duties as a witness and as an officer of the law in the case of the State of Ohio v. Alexander Birns, et al., No. 80677, with intent thereby to obstruct and impede or attempt to obstruct and impede the due administration of justice.

The defendant filed a motion for a new trial, which the trial court overruled and defendant thereupon perfected an appeal. Some weeks later defendant filed a second motion for a new trial on the ground of newly discovered evidence. After a hearing, the trial court overruled the second motion. Defendant perfected an appeal from that decision also. In both appeals, the judgments of the trial court were affirmed in an opinion reported in 10 Ohio App. 2d 103.

THE EVIDENCE.

Cleveland Police officers saw Alexander Birns, known to them as a clearinghouse operator, carrying clearinghouse paraphernalia, to-wit: a paper bag, such as is commonly used in clearinghouse operations to transport bet slips, into the premises at 5715 Brookpark Road, Parma, Ohio.

On July 23, 1964, the next day, the officers entered the premises of the Vulcan Basement Waterproofing Company, a tenant in the building at 5715 Brookpark Road, and there found Alexander Birns and one Edward Keeling.

Keeling and Birns were immediately arrested by the Parma police and taken to the Parma Police Station. Birns was booked and released on bond. Subsequently, Keeling and Birns were jointly indicted by the Grand Jury of Cuyahoga County, Ohio, for the unlawful establishment and carrying on of a numbers operation, to-wit: clearinghouse in violation of Section 2915.13 of the Ohio Revised Code.

Detective Clarence Bennett of the Parma Police Department was one of the arresting officers. He handled police photography at the time of the arrest and was also present when Birns was first fingerprinted and booked at the Parma Police Station. He testified that about 4 o'clock in the afternoon on July 23, 1964, he participated with other Parma and Cleveland police officers in the arrest for numbers violations of Keeling and Birns. At 5715 Brookpark Road, Birns and Keeling were found in a small room in the office of the Vulcan Waterproofing Company (R. 74).

Bennett, particularly in photography, assisted in gathering the evidence and taking Keeling and Birns to the Parma Police Station (R. 75). When off duty, Bennett

did part-time work as a photographer at the Beef & Bottle Restaurant at 5608 Pearl Road, Parma.

On the evening of November 20, 1964, about five months after the arrest and indictment of Birns for clearing-house violation and before the indictment had been set for trial in the Common Pleas Court of Cuyahoga County, Bennett saw Birns at the Beef & Bottle Restaurant. Bennett testified (R. 78-79):

> "As he started to walk out of the bar with this female I commented to him, 'Hello, Shon,' I said. 'Did you see where we arrested your friend Bucci today?' Bucci was the owner of the Vulcan Waterproofing Company, so on the presumption that they were friends, that is why I made that comment to him, and he made—I believe he said he didn't hear it or read it yet, but he says, 'Let's have a drink,' which we did, and we had conversation.
>
> Q. What was the conversation after you had the drink?
>
> A. It was during the time we were having the drink. He made a comment you would never stop prostitution and gambling, and it was going to go on forever, and we discussed his tax problem.
>
> Q. Tell us what you said to him and what he said to you.
>
> A. It may not be the exact wording, because this is a year ago, and I am not too familiar with the wording of it. I made a comment to him about paying—well, he told me that he owed $154,000 to Uncle Sam in back taxes and that he had offered $25,000 as settlement, which he thought they would take, and I told him at the time he should pay his tax, if he wanted to gamble, buy a tax stamp, and he commented to me about a tax stamp, the government knew where you were at and how much money you were making. We discussed that. Also we discussed that he had—he had told me he had a pipe line into

the Cleveland Police Department and other departments, and he knew everything that was going on.

He also told me that with reference to the gambling case, July 23rd, he was going to beat it on a motion, and he wasn't worried about this, and then he came up with a comment of, 'Who is the handwriting expert that your police department has hired?' At this point I knew of no handwriting expert that was hired by our police department."

Later, Officer Bennett learned from the Chief of the Parma Police Department that in fact the Parma authorities had hired a handwriting expert. The following questions and answers appear in the record (R. 80-81):

"Q. Did you have a further conversation with him during that time?

A. Yes, sir. He asked me how strong of a case we had against him. I told him it was a good case, and he wanted to know what we had against him, and I told him it would be a violation of police ethics to tell him this, and—

Then he told me that the gambling—we got back to the gambling again, and he told me that the Cleveland Press condoned the gambling; in fact, they had two editions of the newspapers, one for the east side, and one for the west side, the one on the east side being where the numbers were being played.

And he told me that he would call me on either Tuesday or Wednesday and he would bring the papers to prove that this was a statement he made about the east and west edition, because I told him I didn't believe this."

It happened that in the course of the evening while Officer Bennett was talking with Birns, Parma Police Chief Szabo came into the restaurant. Officer Bennett excused himself from Birns and went into the men's room and informed the Chief that he was conversing with Birns. The Chief instructed him to "Learn what you can, and be

careful" (R. 82). Officer Bennett returned to Birns and resumed conversation.

On the following Monday, November 23rd, Officer Bennett reported to the police chief the conversation that he had had with Birns on the previous night (R. 83).

At three o'clock on the same afternoon Mr. Birns phoned Officer Bennett at the Parma Police Station and stated that he had the papers and wished to meet the officer again at the Beef & Bottle Restaurant that same night between 8:00 and 8:30 (R. 84). After this telephone conversation Bennett again conferred with the Chief concerning the pending meeting with Birns (R. 84).

After discussing the matter with the Chief, Bennett procured two electronic instruments—a Fargo set and a portable tape recorder (R. 84). In describing the Fargo set the officer testified (R. 84-85):

> "It is a radio transmitter that relays through a receiver. In other words, it is wireless, it has got its own power source, it relays a conversation word for word, which is picked up by the receiver and broadcast, just like a regular radio."

About 6:00 o'clock on the same evening, Detective Eschweiler came to Bennett's home and together the two officers tested the Fargo set.

They then proceeded to the Beef & Bottle Restaurant at the intersection of Ridgefield Road and Pearl Road in the City of Parma. Officer Bennett equipped himself with the transmitting portion of the Fargo set. He testified (R. 88):

> "I had the battery pack and the transistorized unit in my inside coat pocket here (indicating). It ran down through a hole in my shirt to a tie pin microphone. The antenna ran around my back and was looped over a few times and inside this pocket" (indicating).

In testing the equipment, Officer Bennett, wired with the transmitter, went into the restaurant and Detective Eschweiler, equipped with the receiving portion of the Fargo set, remained in his automobile parked outside the restaurant. The officers then checked the Fargo set and ascertained that it was working properly.

A few minutes later, while Officer Bennett, equipped with the Fargo set, was sitting at the bar in the restaurant Birns came into the restaurant. The following question and answer appear in the testimony (R. 89):

> "Q. Tell us what happened after he came in.
>
> A. He is carrying several newspapers. He came in and sat down next to me. We discussed the newspapers and he showed me where to find the number, and he went on to tell me about the odds are 500 to one, with the last three numbers, and then with variations there are different amounts that are paid, and then the least, I think, was 100 to 1, and if the numbers ran in different sequences there was a different odds."

These newspapers were editions of the "Cleveland Press" and were received into evidence. (Exhibits 1-5 inclusive.) In connection with the newspapers, the following questions and answers appear in the record (R. 92-93):

> "Q. Now, with regard to—since you have this one in your hand, did he tell you how the number was determined?
>
> A. He told me to take the last three numbers of the advance and the declines and the unchanged, and this is what determines the number that those people play.
>
> Q. What number is that?
>
> A. This particular one, it is 713."

Birns told the officer that the players pick the numbers by astrology, birth dates, and other weird ways (R. 93).

After showing Officer Bennett how the winning numbers were determined from the stock publications in the Cleveland Press, Birns continued to discuss the subject of gambling. Bennett testified (R. 102):

> "Q. What happened after that?
>
> A. The discussion was still on gambling. He made a comment that if the numbers were knocked off that thousands would be on charity the following day, and also conversation went on again and he started talking about his arrest on Brookpark.
>
> * * *
>
> Q. What was said after that?
>
> A. He told me that a female clerk had overheard his conversation and relayed the information to a woman reporter who in turn relayed that information to Sergeant Dever from Cleveland Police Department, and that is how his arrest came about at 5715 Brookpark."

After this conversation at the bar in the Beef & Bottle Restaurant, Birns suggested that they eat (R. 104). They then moved from the bar to a table along the north wall. After orders for food were placed, Birns *again* asked Bennett for the name of the handwriting expert. That morning the Parma Police Chief had revealed the name of the handwriting expert to Officer Bennett, so that on this second occasion when Birns again asked Bennett for the expert's name Bennett did know his name; however, he did not reveal it to Birns but instead told him that the handwriting was sent to the F. B. I. The officer testified, "That is what the chief told me to tell him" (R. 105).

The following questions and answers appear in the record (R. 105-107):

> "Q. Prior to the time that you were seated as you have indicated for the record and to the Court and

jury, was there any conversation at the bar that you didn't tell us?

A. Yes, sir.

Q. Will you tell us what that conversation was?

A. We talked about—the conversation started to lag so I mentioned that I had my kids photographed the day before and we talked about—he asked me how many kids I had and I told him five and seven/ninths, and he asked my salary and I told him $6800.00 a year, and he told me, 'How can you raise five kids on $6800.00 a year? I have an interest that pays me $20,000.00 a year from an ore company in Canada,' and he mentioned that he had one kid and he had a hard time raising him, and also that he wanted more, and this was what caused marital difficulties with him.

* * *

Q. What conversation did you have there that you haven't mentioned to the jury?

A. Well, after discussing the F. B. I. we ate and the waitress brought the food, and there was some more conversation. I don't recall what it was specifically, but while we were eating Mr. Birns pulled out a wad of bills and put it by my right elbow and I asked him, I says, 'What is this for?' And he says, 'This is a Christmas present for you and your wife and kids.' I told him, 'I know better than that. What do I have to do for it?' And he told me, 'You can be helpful,' and I asked him, 'What way?' And he said, 'Drop a word here and there,' and then he told me 'Ninety percent of the people wheel and deal. Do you want to be a square or do you want to wheel and deal and make a buck.' I asked him again, 'What is the $200'—I fanned the money at this time to see how much was there, because I knew that Eschweiler was out in the car, and I fanned the money and counted twenty tens. I asked him, 'What is this $200 for?' He told me he wanted information on this

case, relative to this case. He told me he was going to beat the case on a motion, on illegal search and seizure, and in the event he didn't he would like to know what was going on."

After Birns asked the officer for information on his pending gambling case from 5715 Brookpark Road, Parma, the men conversed further (R. 109-110):

"Q. What did the defendant say to you and what did you say to him?

A. I told him, 'I got a feeling I am being conned or involved with this $200.00, and I don't want to wind up like Mervin Gould,' and he told me the F. B. I. said that Mervin Gould was the lowest thing around and he deserved to die.

Q. Was there any further conversation about that?

A. Yes, sir. We talked about the F. B. I., too.

Q. All right. What did the defendant say to you and what did you say to him?

A. He told me he wasn't worried about the F. B. I., that if there was anything involving him they would tell him which way to go, and that when big wheels from the F. B. I. came to town, the F. B. I. agents here in Cleveland would come to see old Shon and pick up tickets, box seat tickets, for old Shon had the best tickets in town."

After the money was passed, Bennett gave a pre-arranged signal, whereupon Detective Eschweiler left his automobile and entered the restaurant. At the same time Detective Bennett went into the lavatory. There he met Detective Eschweiler and showed him the bills that he had just received from Birns and instructed Eschweiler to make the arrest. Officer Bennett then returned to the table and sat down with Birns. At that point Detective Eschweiler walked up to the table and spoke to Officer

Bennett in the presence of Birns. Birns then said, "I think it is time I get out of here." He then got his hat and coat. Detective Eschweiler arrested him at the front door (R. 112).

In the meantime a police cruiser had arrived at the front door. Birns was taken to the Parma Police Station. Before entering the police station Birns whispered to Bennett, "Don't tell them nothing, they ain't got nothing on either of us" (R. 114). At about 9:30 p.m. Birns was booked and released on bond.

At the time he was arrested on November 23rd the indictment against him for the violation of the State statute pertaining to clearing house was pending. Bennett testified that when Birns wanted information relative to the pending gambling case, Birns told the officer that he would not jeopardize the officer's position by telling where he got the information.

In their opening statement to the jury defense counsel represented that Detective Bennett indicated to Birns that it was difficult for him to support his five children on a policeman's salary of $6800 per year. On direct examination Officer Bennett testified that it was Birns who brought up the subject. Birns also said that he had difficulty in raising one child on $20,000 a year.

Detective Frank Eschweiler testified that he had been assigned by Chief Szabo of the Parma Police Department to assist Detective Bennett and in consequence thereof at 6:15 p.m. he went to the home of Officer Bennett where they tested the Fargo receiver. At 7:15 p.m. the officers proceeded to the corner of Ridgefield and Pearl Road, Parma. Officer Eschweiler had his personal auto and he parked it on Ridgefield Avenue about 50 feet from the corner of Pearl Road. There they again tested the Fargo equipment. He stated that in testing, Bennett went to

various parts of the restaurant and spoke into the transmitter and that he, Eschweiler, while sitting in his car was able to hear everything that Benntt said.

While he was seated in his car in front of the restaurant Eschweiler observed a black Cadillac enter the parking lot and saw Birns get out of the Cadillac. Birns was carrying newspapers with him at the time. Shortly thereafter Officer Eschweiler commenced receiving conversation through the Fargo receiver. Eschweiler testified (R. 245-249):

"Q. What did you hear after that?

A. There was general conversation about the newspapers and the gambling that took place on the numbers that were on the financial page of the paper.

Q. Well, will you tell us as best you can recall what Detective Bennett said and what the defendant said?

A. Not the exact wording, but the best I can recall I heard Mr. Birns telling Detective Bennett that he had brought the papers that he had talked to him about on a previous occasion, and that he then went on to say that this was an east side edition, this was a west side edition, and that certain items found in the east side were not found in the west side edition, and that this was published by the Cleveland Press.

Q. What did you hear after that?

A. This conversation carried on for a few minutes and then there was a brief lull where there was no direct conversation and then I heard Detective Bennett start to tell Mr. Birns that he had recently had his children photographed.

Q. What happened after that?

A. Mr. Birns asked him how many children he had, and Detective Bennett replied, 'I have five and a fraction of another one.' His wife was expecting at the time. Then I heard Mr. Birns ask Detective Bennett what his salary was as a detective, and Detective

Bennett replied, '$6,800,' and Mr. Birns then stated he didn't know how Detective Bennett could raise five children on $6,800. He said that he received a salary of $20,000 a year from an ore company interest and that he had trouble raising one child on this. He further went on to state that he had always wanted more children, that they had only had one child, and that his wife didn't, that this was a primary cause of their martial (sic) troubles and why they split up.

Q. Did you hear any further conversation after that?

A. Then Mr. Birns asked Detective Bennett what had happened with the handwriting samples that they referred to in their previous meeting, and Detective Bennett replied that these had been sent to the F. B. I., that the F. B. I. was checking the handwriting, and Mr. Birns replied that he was not worried about the F. B. I.

Q. All right. What conversation did you hear after that?

A. After that Mr. Birns suggested to Detective Bennett that they sit down at a table and have some dinner, which apparently they did. Then I heard a waitress ask if they cared to order. I heard Detective Bennett tell the waitress that he would have a steak. Mr. Birns said that he would have the veal cutlet dinner.

Q. What happened after that?

A. After this, apparently the food, from the sound I could hear over the receiver, their food was apparently brought to the table, and the next thing I heard was Detective Bennett say, 'What is this for?' and Mr. Birns replied that was for Christmas presents for his wife and family. Detective Bennett then stated that he didn't believe this and again asked, 'What is this for?' Mr. Birns replied that this was for information. Detective Bennett then said that he couldn't

divulge any information to him. Mr. Birns then stated that 99 percent of the people wheel and deal. He then asked Detective Bennett if he was any different. He asked him if he wanted to be a square or if he wanted to wheel and deal and make a buck. To respond to this Detective Bennett stated, 'You just gave me $200. I have a feeling that I am going to be involved.' Mr. Birns then told him, no, he wasn't going to be involved, that all he wanted was information about his case pending from Parma, and also any information that might come up in the future that would be of value to him. He just wanted him to drop him a word.

Q. What happened after that?

A. Detective Bennett then stated that he was concerned, that he was thinking about what had happened to Mervin Gold and Mr. Birns stated that he didn't have to worry about what had happened to Mervin Gold, that the F. B. I. had even said that Mr. Gold should have been killed a long time ago. He told Detective Bennett, 'You can never be as low as this guy.'

Q. Was there any conversation after that?

A. Yes. Detective Bennett again repeated what did he have to do for this $200, and Mr. Birns said that all he wanted was information concerning this case pending from Parma, and anything that would come up in the future.

Q. What happened after that?

A. After this the conversation then went to the F. B. I. again and Mr. Birns again stated that he was not worried about the F. B. I., that he knew people in the F. B. I., and that when any of the big shots from Washington would arrive in town and the F. B. I. would want tickets for any of the athletic events, such as football games, that they would call old Shon, because he always had the best seats in the stadium, that Shon would provide them with the tickets that

they want, that also if they had anything on his case that was pending from Parma that they would call him, that they would tell him which way to move.

Q. Did you hear any conversation after that?

A. After this Detective Bennett excused himself to go to the washroom, and that was our prearranged signal.

Q. When did you arrange this signal?

A. At Detective Bennett's residence.

Q. All right. Then what happened?

A. As soon as he excused himself from the washroom I turned the receiver off and all the equipment in my vehicle and I went directly across to the restaurant and entered and then went into the washroom."

In the washroom Bennett showed Officer Eschweiler the money that he had received from Birns. When they left the washroom Bennett went back to the table and seated himself with Birns. Eschweiler called the police station from the lobby of the restaurant and requested that a cruiser respond (R. 250). He then went to the table where Birns and Detective Bennett were seated. In the presence of Birns, Bennett asked Eschweiler if he was working nights and at that point Birns immediately said he had better leave right now (R. 250).

Birns started walking toward the cloak room. Officer Eschweiler followed him. After Birns got his hat and coat and walked to the front door, Officer Eschweiler put Birns under arrest. Detective Bennett and Birns were driven to the police station in a police cruiser. Officer Eschweiler followed in his personal automobile.

At the police station the following conversation took place between Officer Eschweiler and Alexander Birns (R. 252):

"Q. Will you tell us what you said to him and what he said to you?

A. Yes. I had the $200 with me. I had taken it from Detective Bennett. I went up to the booking room and I told Mr. Birns that he was under arrest for attempting to bribe a police officer. I told him that I was sure he was aware of his constitutional rights, but however I would advise him that he was entitled to an attorney or phone call. He said he would make a phone call. I asked him if he cared to make any statements concerning the incident. He said he did not want to make any statement, that he did not know what we were talking about, that he had been at the restaurant having dinner alone."

At this time Birns obviously did not know that when he was conversing with Bennett that evening in the restaurant, Bennett had concealed on his person a radio transmitter.

At the time that Officer Eschweiler was in the automobile listening through the Fargo receiver to the conversation between Bennett and Birns, he also had a tape recorder in the automobile.

While he was seated in the car for over an hour and a half, Officer Eschweiler was equipped with only one reel of recording tape. Much of the conversation between Bennett and Birns during this period was "small talk" not related to the bribery. Eschweiler did not attempt to record the "small talk" coming over the Fargo receiver on to the tape recorder. Consequently, having only one reel of tape, he turned the tape recorder off while the "small talk" was going on.

In accordance with routine police regulations, officers Bennett and Eschweiler made a departmental report. They were cross-examined extensively concerning this report. Defense counsel requested the officers' statements and the state not only turned them over to defense counsel for inspection but also offered them into evidence and they were received without objection as state's exhibits 9 and 10.

On the evening of November 20th, 1964, the date of the first meeting between Officer Bennett and the defendant Birns at the Beef & Bottle, the Chief of the Parma Police Department, Francis Szabo, happened to be in the restaurant having dinner with several people. He testified (R. 653):

> "If I recall correctly I was picking up my coat in the checkroom and walking towards the main entrance. I was in the process of leaving when Bennett came towards me, heading toward the washroom."

When Bennett went up to the Chief he talked to him about Birns. On the following Monday, November 23rd, 1964, at the Parma Police Station, Officer Bennett again discussed Birns with the Chief. The Chief ordered Detective Bennett to proceed on the case and to take the transmitter and receiver. He also assigned Detective Eschweiler to work with Detective Bennett because he wanted Eschweiler to keep in touch with Bennett and act as his cover man (R. 654-656).

Sgt. Dever of the Cleveland Police Department, an officer with 19 years' experience in the investigation of rackets and gambling, testified concerning the stock quotations in the Cleveland Press that Birns brought to the Beef & Bottle Restaurant and displayed to Bennett there. The numbers were obtained from an article headed, "What the stocks did today, Thursday, Advances, Declines, Unchanged, Total" (R. 632).

Sgt. Dever participated in the arrest of Birns on the 23rd day of July, 1964 at 5715 Brookpark Road.

Defense Evidence.

The essence of Birns' testimony was that when he learned that Bennett was supporting five children on a salary of $6,500 a year he gave Bennett $200 as a gift. As

to the substance of the conversation surrounding the delivery of the $200, Birns actually corroborated Bennett.

Under cross-examination, he testified (R. 700):

> "So I proceeded further, and we got into the subject of clearinghouse, so I said, 'There is nothing morally wrong about that, neither.' I says, 'As a matter of fact, the newspaper, the stock edition newspaper on the east side in the Belt'—which is the colored belt, the negro belt—'carries the digits, and the same paper that gets out in your area, they don't carry that.'"

Under cross-examination he further admitted that he took the time to go to various parts of the city to get these newspapers and suggested a dinner meeting at the Beef & Bottle, at which time he would hand over these newspapers to Bennett.

Birns admitted that after he gave Bennett the money he told Bennett, "Look, if you can be helpful, O.K" (R. 708).

With reference to publicity, there was testimony by Birns that shortly after he was arrested, of his own volition he made public appearances on television and radio and demanded that the tape recording be played to the public on the television and radio.

He admitted that Bennett had participated in his arrest for the clearinghouse violation.

In answer to a significant point-blank question as to whether he asked Bennett if a handwriting expert had been engaged in connection with his arrest for clearinghouse violation, Birns admitted that he brought up the subject of a handwriting expert with Bennett. He admitted saying to Bennett, "I understand they have a handwriting expert" (R. 747).

He admitted he told Bennett that 90 per cent of the people "wheel and deal." He admitted that Bennett did not ask him for money (R. 839).

With reference to his criminal record, he admitted that he had been convicted of income tax evasion for which he served time in Atlanta; that he had been convicted of auto stealing for which he served time; that he had been convicted of assault and battery of a police officer; that he had been convicted of bribery for which he served time.

When asked on cross-examination how much cash he had with him when he gave Bennett the $200, his answer was that he may have had $400 or $500. On rebuttal, a Parma Police officer testified that when Birns was booked, shortly after his arrest, he had $46.64 on his person.

Birns, under cross-examination, had denied carrying a paper bag into the premises at 5715 Brookpark Road. On rebuttal, Sgt. Dever testified that on July 22nd he *saw* Birns carrying a brown paper bag into the premises at 5715 Brookpark Road where he was subsequently arrested for the clearinghouse violation, that brown paper bags are particularly used to carry clearinghouse bet slips to a clearinghouse, the reason being that the paper bags along with the bet slips stored in the bags are destroyed at the end of three days.

ARGUMENT AND LAW.

I. In a trial for bribery of a police officer and for attempting to influence the officer as a witness in another case, was the petitioner denied a fair trial by the admission of testimony as to evidence that had been suppressed in the other case where petitioner had injected such subject matter into the trial and it is not probative of the guilt of the accused on the bribery and witness tampering charges?

The petitioner claims a constitutional violation because a Common Pleas Judge granted a motion to suppress in the clearinghouse violation case, *State v. Keeling, et al.* The petitioner contends that when the bet slips were suppressed in the clearinghouse case they were necessarily suppressed in this case.

The State did *not* offer the actual bet slips, adding machine tapes or money taken in the clearinghouse arrest into the evidence. The defense itself first injected this subject matter of the material seized in their cross-examination of Officer Bennett. It appears in the record as follows:

> "Q. Mr. Bennett, would it refresh your recollection with respect to when you first saw the materials which were seized on July 23rd, 1964, if I suggested that you saw them before you testified in the grand jury?
>
> A. Wait a minute, I still don't follow you.
>
> (Pending question read.)
>
> A. I saw them the day it was seized." (R. 130-131.)

After the defense had opened the door on the subject, as quoted above, the State followed through on the same subject in re-direct examination (R. 229-230):

"Q. Officer, during your cross-examination I believe reference was made by Mr. Day to materials that were seized at 5715 Brookpark. Do you recall that?

A. Yes, sir.

Q. Now, who was present with you when these materials that Mr. Day alluded to were seized?

A. I think everybody was. Everybody that was there.

Q. All the officers that you mentioned in your previous testimony?

A. I believe so.

Q. Will you tell us what it was that you seized there?

A. Two adding machines, tapes that were used, unused tapes, money, and some white pads, I believe.

Q. Now, when you say tapes were confiscated there, will you explain to us what you have reference to?

A. They were punched on an adding machine.

Q. Did you find anything else there other than the tapes?

A. The money, blank tapes.

Q. And do you have knowledge as to what kind of tapes these were?

A. Only what I was told.

Q. Did you find anything there other than tapes and the adding machines?

A. Yes, sir. Mr. Birns' hat.

Q. And was there anything in his hat?

A. Yes, sir.

Q. What was in his hat?

A. I believe there were tapes, and I am not sure but I think there was money in it also.

Q. All right. I believe you indicated that you took photographs of what you observed and saw there that was seized; is that correct?

A. Yes, sir." (R. 229-230.)

The above-quoted testimony went into the evidence without objection. Sgt. Dever's testimony as to what he saw in the clearinghouse raid was merely cumulative to that of Officer Bennett, whose testimony of what he saw there was received without objection.

Footnote 9 to the majority opinion in *Mapp vs. Ohio*, 367 U. S. 643, states:

> "As is always the case * * *, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected."

The essence of the present case is what Birns said and did at the Beef & Bottle when he paid the $200 to Bennett, and this was established in the testimony of the officers that Birns paid $200 to Bennett, a public officer, as a bribe for information from Bennett as to the identity of the State's handwriting expert in the clearinghouse case and for other information pertaining to that case, and that at their two meetings Birns tried to influence Bennett who was a witness in that case. Birns asked Bennett for the name of the handwriting expert, telling Bennett that the evidence in the Brookpark Road case was going to be suppressed on the grounds of illegal search and seizure but he wanted to know the name of the expert in the event the evidence was not suppressed. At the time of the bribe offer Birns obviously did not know how the trial court would rule on a motion to suppress that was yet to be heard.

Since Birns wanted that information irrespective of whether the evidence was going to be suppressed, the fact that it was later suppressed is of no consequence in this case. The important thing is that the indictment was pending at the time. Whether it was subsequently nolled, or Birns acquitted, or the evidence suppressed—none of these

would have any bearing on guilt on the bribery charge. Bribery is an offense against public justice, the gist of the crime being the wrong done to the people by corruption in public service. 11 *C. J. S.* p. 840.

Birns admitted on the witness stand that after talking to Bennett on the night in question he knew that Bennett was one of the arresting officers in the clearinghouse case. Therefore, he had knowledge that Bennett was a witness against him as to what transpired in the clearinghouse case.

There was testimony that Birns was seen carrying a brown paper bag into the building on Brookpark Road where he was subsequently arrested, and that brown paper bags are used to carry clearinghouse bet slips into a clearinghouse office. (*U. S. v. Townsend*, 253 F. 2d 462.) Sgt. Dever, the Cleveland Police Department specialist on the numbers rackets, testified briefly about the technique of its operation.

At their meeting at the Beef & Bottle, Birns gave Bennett a lengthy exposition of the mechanics of clearinghouse operation, even to the extent of promising Bennett that he would make special efforts to locate Cleveland newspapers which published the stock quotations from which the winning clearinghouse numbers were determined in the Negro sections of the city but not in the white sections. Since Birns himself brought up the subject of clearinghouse operations, the jury, so that it would have an intelligent understanding of the entire case, was entitled to a brief explanation of clearinghouse operation as set forth in the testimony of Sgt. Dever.

The opinion of the Court of Appeals disposes of the question as follows:

> "There is no doubt but that Birns brought into the case the matter of his involvement in numbers operations so that evidence as to the manner in which such

a lottery is operated was clearly proper." (10 Ohio App. 2d 103.)

The defendant complained in the Court of Appeals that the court erred in permitting the jury to view the premises at 5715 Brookpark Road, stating that "what occurred at 5715 Brookpark Road was not a material fact."

The second count of the indictment charges Birns with attempting to influence Bennett as a witness in case No. 80677 in the Common Pleas Court, Cuyahoga County, Ohio, wherein Birns was charged with the clearinghouse violation at 5715 Brookpark Road. As one of the arresting officers, Bennett was a witness.

It was part of the State's proof to show where officer Bennett became a witness against Birns.

The court instructed the jury (R. 1026):

> "You were permitted to view the premises where the acts complained of are alleged to have occurred. You were instructed at that time that that was done for the singular purpose alone of enabling you to understand and apply the evidence as you heard it detailed by the witnesses. What you saw on this view is not evidence and you must not so regard it.
>
> The view was for the sole purpose of giving you a sense of relation as would enable you to better understand and apply the evidence."

Section 2945.16 of the Ohio Revised Code provides:

> "When it is proper for the jurors to have a view of the place at which a material fact occurred, the trial court may order them to be conducted in a body, under the charge of the sheriff or other officer, to such place * * *."

The above quoted section does not limit the viewing by such jurors to the place where the crime for which the trial is being held occurred. In *State v. Pigott*, 1 Ohio App. 2d 25, the Court said:

"The object of the jury view as indicated by this statute is to have a view of the place at which a material fact occurred. The case on trial may be one in which any number of material facts occurred in a variety of places. Clearly, it would not be violative of the statute, under such circumstances, that all such places be viewed by the jury. The statute does not contain the language, 'where the crime occurred,' nor is it limited to that construction. * * *"

Petitioner relies on *Silverthorne v. United States*, 251 U. S. 319. In that case, while the defendants were detained in federal custody without authority federal agents went into their office and made a clean sweep of law books, papers and documents. An application was soon made to the district court for the return of what had been unlawfully taken. Photographs were made and copies made of the papers that had been seized. The District Court ordered the return of the originals but subpoenas were issued to produce the originals even though it had been found that the papers had been seized in violation of constitutional rights. In other words, the Government studied the papers that had been unconstitutionally seized and then from that knowledge sought to subpoena them. The Court pointed out that by indirection the Government could not use the knowledge obtained in violation of constitutional rights. Headnote 1 reads:

"1. The knowledge gained by the Federal government's own wrong in seizing papers in violation of the owners' constitutional protection against unlawful searches and seizures cannot be used by the government in a criminal prosecution by serving subpoenas upon such owners to produce the original papers, which it had returned after copies had been made, and by obtaining a court order commanding compliance with such subpoenas."

The *Silverthorne* case is therefore distinguishable on the facts since evidence that had been unlawfully seized formed the sole basis for the Government's case. Here the bet slips were not the basis of the State's case.

II. When a corroborating witness who listened to the bribe offer said that he actually overheard all that he had testified to overhearing and there is no evidence that his testimony was false and defendant's testimony is not in serious conflict therewith, was the petitioner denied a fair trial by the fact that the jury did not know that the witness had been absent from his listening post for five minutes?

This question involves the claim of suppression of evidence that was raised in connection with a motion for a new trial based upon newly discovered evidence, which the defendant filed along with supporting affidavits. The State filed counter-affidavits that were in direct conflict with those filed by defendant. Rather than decide the motion upon the affidavits, the trial court set the motion for hearing. At the hearing evidence was presented by both sides.

Defendant's Evidence.

One Donald E. Hale, 24, testified that at about 8:00 o'clock on the evening of November 23, 1964, he drove his Dodge sedan into the rear end of a Plymouth sedan that was properly parked on Ridgefield Road near Pearl Road in Parma, Ohio. At the time of the collision the parked Plymouth was occupied by Detective Frank Eschweiler of the Parma Police Department. Hale said that following the collision Officer Eschweiler alighted from his car and the two men then stood in the street and discussed the details of the collision for about 30 to 45 minutes (MNT R. 198). He said he was not given a traffic ticket

by any police officer, nor did any other police officer come to the scene (MNT R. 199).

He claimed that as he stood in the street talking with the officer, two of his friends, Martin C. Marcoguiseppi and Adolph Brezovar (MNT R. 202) were standing across the street outside the door of Bearden's Restaurant. He said that sometime later in the first part of December, a police officer came to his home and handed him a summons to appear in the Parma Municipal Court on December 14, 1964.

Under cross-examination Hale said (MNT R. 215) that while drinking at the Guys & Dolls, a bar, one Alvarez overheard him talking with his friends, Marcoguiseppi and Brezovar. Alvarez then phoned the defendant Birns. Hale then talked to Birns on the phone and made arrangements with Birns for a meeting at another bar, the LaScala Lounge Bar. Later Hale and his two friends met with Birns at the LaScala Lounge on four or five occasions.

There he met Birns' counsel, Mr. Day, and also one Russell Henry, a Notary Public who was with Mr. Day. These gentlemen had with them typewritten affidavits that they brought to the meeting.

Mr. Hale and his friends, Mr. Marcoguiseppi and Mr. Brezovar, signed these affidavits at the LaScala Lounge.

State's Exhibit 4B is a Motor Vehicle Accident Report dated March 18, 1965, made and signed by Hale. It was filed with the Bureau of Motor Vehicles, State of Ohio. Hale admitted that in the report he wrote 9:00 p.m. as the time of the accident (MNT R. 253).

After the affidavit was signed, the men visited the bar three more times, remaining there two or three hours as guests of Mr. Birns. Brezovar did not walk across the street to talk to his friend Hale at the place of the collision (MNT R. 355).

State's Evidence.

Detective Frank Eschweiler arrived at the scene at 7:45 p.m. on the night in question in his personal automobile, which he parked on Ridgefield Drive just east of Pearl Road. He was in his car under a special police assignment, listening over an electronic receiver to a conversation between Detective Bennett and Birns when his car was struck from the rear by another vehicle. He stated (MNT R. 486-487):

> "A. As soon as I was struck, I immediately got out of my car, and the driver of the other vehicle that struck me got out of his and walked up to me. And we discussed the accident briefly.
>
> Q. How long were you out of your car at this time?
>
> A. Completely until I reentered?
>
> Q. Yes.
>
> A. At the most, five minutes."

Eschweiler showed Hale his badge and told him that he was a Parma police officer and would have to call the accident in. He then went to a telephone at Bearden's Restaurant and notified the Parma Police Department, where the call was electronically recorded at 9:05 p.m. The collision occurred a few moments before the call (MNT R. 485).

After Eschweiler made the call he returned to his car and told Hale (MNT R. 488):

> "A. At this time, after I made the call, I returned and told him that I had called, and they were sending a police car down, and that he should wait in his car, and I reentered my car and continued on in work that I was originally there for.
>
> Q. Did a police officer respond to your call?
>
> A. Yes, he did.
>
> Q. What police officer was that?

A. Patrolman Gabriel responded.

Q. And do you know about how long it was before he arrived on the scene after you made the call?

A. It was just a short time after that, a few minutes he arrived."

He saw Hale and Patrolman Gabriel walking together toward Gabriel's patrol car (R. 489).

After Eschweiler reentered his car he remained for another ten minutes until he received a prearranged signal from Bennett as to what had taken place in the Beef & Bottle. He testified (R. 490):

"Q. How long did you remain on the scene after Patrolman Gabriel gave your license back?

A. I was there for approximately another 10 minutes, and then I drove across the street to the Beef and Bottle.

Q. And why did you go to the Beef and Bottle at that time?

A. I had received a signal from Detective Bennett with regard to what he was—what had taken place in the Beef and Bottle, and this was a prearranged signal that if I was to hear it I should immediately enter the restaurant, which I did."

On several occasions after the accident Hale told Eschweiler he could not pay for the damages, he did not have any money and there was nothing Eschweiler could do about it (R. 493).

State's Exhibits 5 and 6 were received in the evidence. State's Exhibit 5 is the official report of the Parma Police Department setting forth the time of the accident at 9:05 p.m. State's Exhibit 6 (defendant's Exhibit G) is an official communication dated February 24, 1965 from the State of Ohio, Bureau of Motor Vehicles, to Donald R. Hale, advising Hale that he had been in a motor vehicle accident on November 23, 1964, and that his driver's license would

be suspended unless he submitted evidence of restitution for damages. Hale came to the police department about a week later and agreed to sign a note to cover payment for the damages (R. 505).

The officer was asked (R. 506):

"Q. During the course of the trial in December of 1965, that is Case Number 81317, the State of Ohio versus Alexander Birns, you testified that you heard certain things that were transmitted to you by a device that was on the person of Detective Bennett, is that correct?

A. That is correct.

Q. Did you hear every thing that you testified to in court under oath?

A. Yes, I did."

Under cross-examination Eschweiler said he arrived at the scene between 7:30 and 7:45 p.m. He entered the Beef & Bottle Restaurant between 9:15 and 9:30 p.m. He emphatically denied that he was out of his car talking with Hale for 30 to 45 minutes.

At the Parma police station at 9:05 p.m., police dispatcher Collari ordered Officer Henry Gabriel to the scene of an accident at Ridgefield and Pearl Roads. Officer Gabriel arrived there at 9:10 p.m. After briefly conversing with Patrolman Eschweiler, Gabriel then placed Hale in the rear of the police cruiser. Hale related the details of the accident. Officer Gabriel then issued him a citation (defendant's Exhibit 2). When Gabriel wrote out the citation, four copies were simultaneously made. He handed one of the copies to Hale at the scene. He notified headquarters at 9:24 by radio that he had completed his investigation at the scene and was returning. At 9:45 he was dispatched in his cruiser from the police station to the Beef & Bottle Restaurant, where he picked up Detective

Bennett and Birns and brought them back to the police station. Later in the evening he made out his official accident report (State's Exhibit 5).

State's Exhibit 2, the officer's "Daily Activity Report," was prepared by Officer Gabriel. It disclosed that the number of the traffic ticket he issued to Hale was AA 5946.

He testified that Hale's ticket was the last one he had issued on the night in question. Altogether, he was with Hale for fourteen minutes at the scene.

One Dennis Nicholas was acquainted with Detective Eschweiler. Shortly after 8:30 p.m. on the night in question he left the home of his fiancee and arrived at the vicinity of Bearden's Restaurant at about 8:45 p.m. At this time he briefly spoke to Officer Eschweiler who was seated in his car across from Bearden's Restaurant. At that time there was no damage to Eschweiler's car, nor did he see any other person or automobile in the vicinity of Eschweiler's car.

On December 14, 1965, he was summoned to Parma Municipal Court for a minor traffic violation, where he saw Hale. Hale told him that he also was there for a traffic violation. Hale said that he had collided with a car owned by a Parma police officer and that another police officer had arrived at the scene and placed him under arrest.

At MNT R. 586 the trial court stated:

> "The court would like to briefly state the basis for its ruling. Both Detective Eschweiler and Police Officer Gabriel spoke with candor and frankness. Mr. Eschweiler told us that an accident happened a little after 9:00 o'clock. The police report indicates the accident happened at 9:05. The citation which was issued indicates the accident happened at 9:10. Now,

the city of Parma has an electronic machine, I will call it for lack of a better explanation, and the prosecution presented a tape which was marked and received in evidence, and it shows how Mr. Eschweiler reported the incident at 9:05, Patrolman Callari dispatched Mr. Gabriel at 9:05, and how Mr. Gabriel in turn reported at 9:24 that all was secure. Also, the daily activity report of Mr. Gabriel which is in evidence as an exhibit indicates generally the same information. It is absurd to think that the whole department of police of the city of Parma would cooperate with one policeman or two policemen to fabricate a lie."

The court further stated (R. 587):

"The court has absolutely no reservation that Mr. Gabriel was at the scene of this motor vehicle accident. The court has no reservation whatsoever that Mr. Gabriel issued a ticket to Mr. Hale. The court has no reservation about the propriety of the police report filed by these two officers."

In further discussing the evidence the court said (R. 588):

"Now, with reference to Mr. Hale. This court is of the opinion that the motor vehicle accident report to Columbus speaks for itself. The motor vehicle accident report was marked and received in evidence, and it is written in the hand and over the signature of Mr. Hale, and it tells us that this incident occurred at 9:00 o'clock. For all purposes, that is the same time that Mr. Eschweiler said the accident happened; it is the same time that Mr. Gabriel said the accident happened, give or take a couple of minutes.

"The affidavit that was submitted, changed though it might have been, is very interesting, because read prior to its change it would read as follows: 'Affiant further says that the operator of the aforesaid Plymouth automobile which was parked at the curb

alighted from his car, identified himself as Frank Eschweiler, a Parma detective, and a conversation over and investigation of the accident followed which lasted between 35 and 45 minutes. Affiant further says that another police officer eventually came to the scene,' et cetera.

"The original affidavit prior to its change suggests the very things that Detective Eschweiler and Patrolman Gabriel tell us is the fact."

In addition to claiming that Eschweiler's testimony was impeached, petitioner's counsel, by relying on *Napue v. Illinois*, 360 U. S. 264, infers that Eschweiler testified falsely. In *Napue* a state's witness testified falsely that he had received no promises in consideration of his testimony. The state's attorney knew that this testimony was false. In the present case, Officer Eschweiler testified at the hearing on the motion that he had in fact heard over the electronic receiver everything that he had testified to at the trial. There is no evidence that Eschweiler at any time gave any testimony that he knew was false.

There was no testimony by the defendant as to what was said during this five minute interval. What might have been said by either the defendant or the police officer would be mere speculation.

The issue raised by the motion was: Had the jury known of the accident, would a different result have been obtained? It was the trial judge's finding that if the jury had known of the accident, the jury's verdict would still have been the same. The Court of Appeals affirmed this finding, stating, "The credible evidence on the collision, as shown by the record, clearly supports such result."

Eschweiler did not omit or suppress anything that he actually heard. Here there was no actual suppression of positive evidence, nor employment of false testimony

or fabricated evidence; therefore no constitutional question arises. As pointed out in the opinion of the Court of Appeals, Eschweiler's testimony was corroboratory in character. With the exception of the five minutes that he was out of the car he listened to the conversation between Bennett and Birns for an hour and fifteen minutes, and "the parts of the conversation to which he testified, he had heard over the transmitter."

Birns himself admitted that after giving Bennett the money he told Bennett, "You can be helpful." "Drop a word here and there."

"Helpful" is defined in *Webster's New International Dictionary,* Second Edition, as, "To lend aid or assistance; to contribute strength or means, to avail or be of use; to assist." Certainly in the light of Bennett's participation in the arrest of Birns, the jury had the right to conclude that by "helpful" Birns meant that Bennett should give him information that would be of assistance in overcoming the State's charges in the then pending indictment for the clearinghouse violations.

The opinion of the Court of Appeals points out that the testimony of the petitioner himself is not in serious conflict with that of Bennett, who participated in the conversation with Birns, or that of Eschweiler, who listened over the broadcasting equipment, and quotes defendant's testimony on cross-examination. This testimony led the Appellate Court to the following conclusion:

> "As thus stated by the defendant, it is clear that the State's case is supported by the defendant's own testimony and upon such evidence, the case was correctly submitted to the jury. The absence of Eschweiler from his listening post for five minutes or less, when the conversation covered a period of time from about 8:15 to 9:30 p.m., was not, upon the record as above stated, a factor preventing defendant from

being afforded due process according to law. The motion for a new trial on the ground of newly discovered evidence was, therefore, properly overruled * * *."

III. Were the petitioner's right of confrontation and right against self-incrimination violated in cross examination of petitioner?

The petitioner contends his constitutional rights were violated when the court permitted the prosecution to ask questions which he claims were deliberately designed to force him to invoke the privilege against self-incrimination. Counsel for the State did not put Birns on the witness stand, did not have a statement from him, and when the prosecutor asked the questions on cross-examination he did not know whether Birns would claim the protection of the Fifth Amendment. Neither did the prosecutor know whether Birns' answers would harm the State's case. Surely the State was entitled at least to attempt to cross-examine Birns.

In the cases cited in the petition it was the government that put the witness on the stand knowing that he would refuse to answer on the ground of self-incrimination, thus by subterfuge attempting to get across to the jury information that under the circumstances it was not entitled to elicit from its own witness. Such was not the case here.

IV. Where the accused initiated publicity two days after his arrest by voluntarily using the public media to advance his claim that the payment of the money was a gift, was the petitioner denied a fair trial by a newspaper article concerning a federal indictment for perjury in an income tax matter returned while petitioner's trial was in progress?

Petitioner complains that due process was violated because of extensive publicity attending his trial.

At the hearing on his first motion for a new trial, the defendant subpoenaed and placed on the witness stand representatives of the Cleveland Press, the Cleveland Plain Dealer, the three Cleveland television stations, various radio stations, and also such national communications media as the Associated Press and United Press. Under subpoena duces tecum they brought with them every newspaper publication, television broadcast, and radio script that was published or spoken over their media in connection with the trial of Birns. All these clippings and transcripts are attached to and made part of the record of the hearing on the first motion for a new trial. Under Ohio law, before a jury verdict will be disturbed there must be proof that newspaper articles or television broadcasts affected the verdict. There is no such showing in this case.

On November 23, 1964, Birns handed Bennett $200 at the Beef & Bottle Restaurant in Parma. He was immediately arrested, booked and released on bond by the Parma Police. About a week later, on December 1, 1964, Birns was indicted by the Cuyahoga County Grand Jury. Two days later, on December 3, Birns himself voluntarily took to the air over radio and television stations WKYC and said (Def. Ex. S-8):

Transcript of Shondor Birns' interview, broadcast 12/3/64:

"Birns: He opened up the conversation by making this statement: He says, you know, I have four-and-a-half kids and I'm only making sixty-five hundred dollars a year. To me it sounded like a beg, or whichever way you want to think it is, but to me that's the way it sounded. So I in turn reached in my pocket and I handed him $200.00 and says, look, this is a Christmas gift for your family and kids, so they'll have a nice Christmas. He didn't know what to say at the moment and he took the money. Then, after a minute or two of other conversation, he said, will you excuse me, I have to go to the men's room. I waited about four or five minutes and he finally came back. He took the $200.00, laid it on the table and put his elbow on part of it: I'd say about one-third of part of it and the other three, two-thirds openly on the table, and he asked this question, he says, Shon, he said, tell me what can I do for you for this $200.00. I said there is nothing you can do for me. I said this is for your family and your kids and I would not want you to jeopardize your job. He said, isn't there something I can do for you. I said, no. He says and he goes on further and says, look, isn't there somebody out here that I can do something for you, some people out here, maybe, are doing something that I could give a break to. I says, no, I don't have anybody out here and I don't have any interest out here. And that's the way I left it. I presume he didn't like those answers, if he is setting a trap up, I presume, that is those answers didn't quite jell with him. And a moment later a gentleman stops over to my table and looks at us and stares at us and starts staring at the table, and I looked up and I said, I don't like this; I says, I'm getting out of here and going home. As I got up, went to the checkroom and got my clothes, I was apprehended by the Parma Police. They showed their credentials and said you are under arrest. And that's what happened.

Sciria: What is your reason for attempting to get the tape recording played?

Birns: I am asking for this definitely, because I believe that if they bring it in and expose the tape recording, I don't think the grand jury would ever have indicted me, and what could be better evidence. After all, if you have got a tape recording, they can't deviate from that, and I'm sure that's the best thing that ever happened to me, and I would appreciate if they would bring this tape recording out and expose it, and in that way the statements I am making, I'm sure, could be affirmed. And that's the best thing ever happened to me; as far as I am concerned, if they got a tape recording, that's the best evidence. My word and his word, it's going to be a battle, but if they have the tape recording, I think it could clear the air, and the statement I am making, I'm sure, can be confirmed by the tape recorder, and I don't know of any better evidence than that, and that's what I want."

In the course of their first conversation Birns told Bennett that he had a pipeline to various police departments. If information had actually reached Birns that the State's recording on the tape recorder was not coherent, one could understand why Birns was publicly demanding the tape recording. (Incidentally, by agreement of counsel the tape was received into the evidence as a joint exhibit and was played to the jury.)

In any event the record in this case unequivocally establishes that Birns, from the outset, sought the support of the public media to bolster his defense by placing it before the entire community. Having done this, he is not in a position to complain.

This petitioner, year after year, has been in the public eye in this community. From the content of the television interviews and newspaper clippings in the record,

the impression is given that, far from being prejudiced, he received sympathetic attention.

The newspaper and television media, while the instant case was being tried, did not interpret the testimony or express any opinion or comment upon the guilt or innocence of Birns. Much of the material shown in defendant's exhibits can hardly be termed favorable to the State. For instance:

In a defense exhibit, the following public broadcast over Television Station WJW, Channel 8, appears:

> "* * * Birns denies any bribery attempt—and has told City Camera that he gave Detective Bennett $200 Dollars last November after Bennett had complained that a low police salary prevented him from being able to give his family a nice Christmas."

In Defense Exhibit 68, defense attorney Jack G. Day is quoted in his final argument to the jury:

> " 'Do not convict for past wrongs or what might be future wrongs,' he said. 'We must have justice.'
>
> He asked the jury: 'If Shondor Birns were looking for someone to bribe, would he not look for someone with access to the evidence? Would he choose a crowded restaurant, where both he and Detective Bennett were well known? Would he throw 20 $10 bills on the table in full view of all people if he were planning to bribe?' "

We fail to see how the above quoted publications were in any way prejudicial to Birns.

The defense complains about the newspaper article that a federal indictment against Birns was returned on December 21st, 1965, charging perjury in connection with his income tax. Defense exhibit 1C:

> "U. S. Attorney Merle S. McCurdy said the federal indictment coming near the end of the bribery trial was not intentional and was not designed to

affect the outcome. He said plans to announce the indictment yesterday were made several weeks ago.

McCurdy said he thought the bribery trial would be over by then, but the trial was protracted for several reasons and we had to make the return because of the statute of limitations."

The federal indictment resulted from Birns' trouble with the income tax authorities, not the State of Ohio. At this point it should be recalled that on the night in question Birns told Bennett that the United States Government had an income tax lien against him for $154,000, which he was trying to settle for $25,000.

In order to condition Bennett to accept the $200, Birns went to such extreme lengths as to boast to Bennett that he had "pipelines" to the various police departments, that the F.B.I. had accepted favors from him. He also informed Bennett of the low esteem in which he held the American public. It is singular that in his zeal to "soften up" Bennett, who was a comparative stranger to him, Birns told him about his personal income tax troubles with the Department of Internal Revenue.

Finally, Birns admitted on the witness stand that he had been convicted in federal court of income tax evasion. It is difficult to perceive how Birns could have been prejudiced by announcement of a mere indictment in the light of his own admissions.

In none of the decisions of this Court cited by petitioner did the accused himself aggressively take to the public media to publicize and enlist sympathy for his defense. The exhibits certainly do not disclose massive publicity adverse to Birns, nor intrusion of representatives of the news media into the trial. Here it was Birns who launched his defense through the news media.

V. Did the trial court's application of the state standard for determining a motion for a new trial on the ground of newly discovered evidence deprive the petitioner of due process of law where no constitutional error exists and the State's case is supported by the defendant's own testimony?

The petitioner asserts that the trial court's finding that "the facts as it found them to be if presented to the jury would not within reasonable probability cause the jury to come to a different result," contravenes the standard for harmless error set in *Chapman v. California*, 386 U. S. 18, 35 Law Week 4197. In *Chapman* admittedly there was a violation of a constitutional right in the comment of the prosecutor on the failure of the defendants to testify.

In the present case, as established in the second subject of argument hereinabove, there was no actual suppression of positive evidence, nor employment of false testimony or fabricated evidence; therefore no constitutional question exists in this case. There being no omission or suppression of evidence vital to the accused and therefore no violation of constitutional safeguards, the trial court correctly applied the state standard for determining a motion for new trial on the ground of newly discovered evidence and the petitioner was not thereby deprived of due process.

CONCLUSION.

This case posed only one question: Did Birns give Bennett the money to help Bennett's children at Christmas or did he give the money to learn the name of the handwriting expert and to influence a witness in the pending indictment for clearinghouse violation? The moment Birns admitted giving Bennett the money but claimed it was a gift, then and there any issue of constitutional safeguards was removed. The petitioner had a fair trial before a fair and impartial court and jury and nowhere were any federal constitutional standards either misapprehended or misapplied. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 753.

ALEXANDER BIRNS,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

SUPPLEMENTARY BRIEF TO PETITION FOR CERTIORARI PURSUANT TO RULE 24(5).

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PRELIMINARY STATEMENT.

Since filing the petition for certiorari in the present case, *Katz v. United States,* ___ U.S. ___, L.ed. (1967) 36 LW 4080 (12/18/67) has come down. This supplement to the petition for certiorari is filed pursuant to Rule 24(5) on the assumption that the *Katz* decision raises an issue of substance not available to the petitioner at the time of the original filing and provides an additional reason for grant of certiorari.

STATEMENT OF THE CASE.

The original statement of the case described the testimony of State's Witness Eschweiler who testified to what he heard on a radio receiver in his car outside a restaurant while petitioner was talking to another officer, Detective Bennett, equipped with a transmitter. The State claimed this talk incriminated the petitioner. Petitioner demanded the tape as soon as its existence became known to him (R. 127-128, 711) and demanded that it be produced at the

trial. This on the ground that a clear and honest tape would exculpate him. It was played and was so noisy and garbled as to be all but totally unintelligible.[1]

REASONS FOR GRANTING THE WRIT.

Whether the use of evidence surreptitiously acquired by electronic means violates Fourth and Fourteenth Amendments in the absence of a search warrant.

Conceivably it may be argued that petitioner opened the door to the corroborating testimony of Witness Eschweiler by demanding the tape and getting it. The rebuttal to this proposition lies in the fact that the petitioner could not know in advance that Witness Eschweiler would say and therefore was unaware until Eschweiler testified that what he had to say would require rebuttal. By the time it became known that rebuttal was required, the knowledge that the only rebutting agent, the tape, was garbled was also in hand.[2] But in the absence of the *Katz* decision, the petitioner did not know[3] the availability of

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[1] A possible exception to this judgment on the tape lies with one passage where the following colloquy is clear:

Bennett: "* * * What I want to know is one thing what do I have to do for this" * * *?

Petitioner Birns: "Nothing I said." (R. 476, cf. R. 407. The indication of parties to the colloquy has been added. The voices and sequence on the tape fully support the attributions here. See St. Ex. 2.)

[2] Actually, a motion to suppress the tape and police testimony was made upon a specific reservation of right to make it. (R. 7, 441-444.) The ground was the false representation to the Trial Court that a copy of the tape was the original in the presence of a policeman witness with knowledge of the truth (R. 203, 312-313, 611, 613, 619-620).

[3] Whatever the reach of *Osborn v. United States*, 385 U. S. 323 (1966) it was by no means clear that it established the "requirement" of a "neutral pre-determination of the scope of a search," *Katz v. United States, supra*, p. 4083, in an electronic search of the kind involved here.

a basis of attack upon the product of the warrantless electronic search. product for lack of "antecedent justification":

> "* * * Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored "the procedure of antecedent justification * * * that is central to the Fourth Amendment," a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed. *Katz v. United States*, p. 4083.

The failure to assert a constitutional proposition unripened at the time of first notice of the facts which make it available does not foreclose assertion when, at last, the principle is announced. See *Curtis Publishing Co. Butts*, 35 L.W. 4636, 4639 (U.S. S.Ct. 6/12/67).

CONCLUSION.

The electronic product (i.e. the testimony of Witness Eschweiler) was acquired in violation of the Fourth Amendment to the Constitution of the United States, obviously led to petitioner's conviction, and therefore should be reversed.

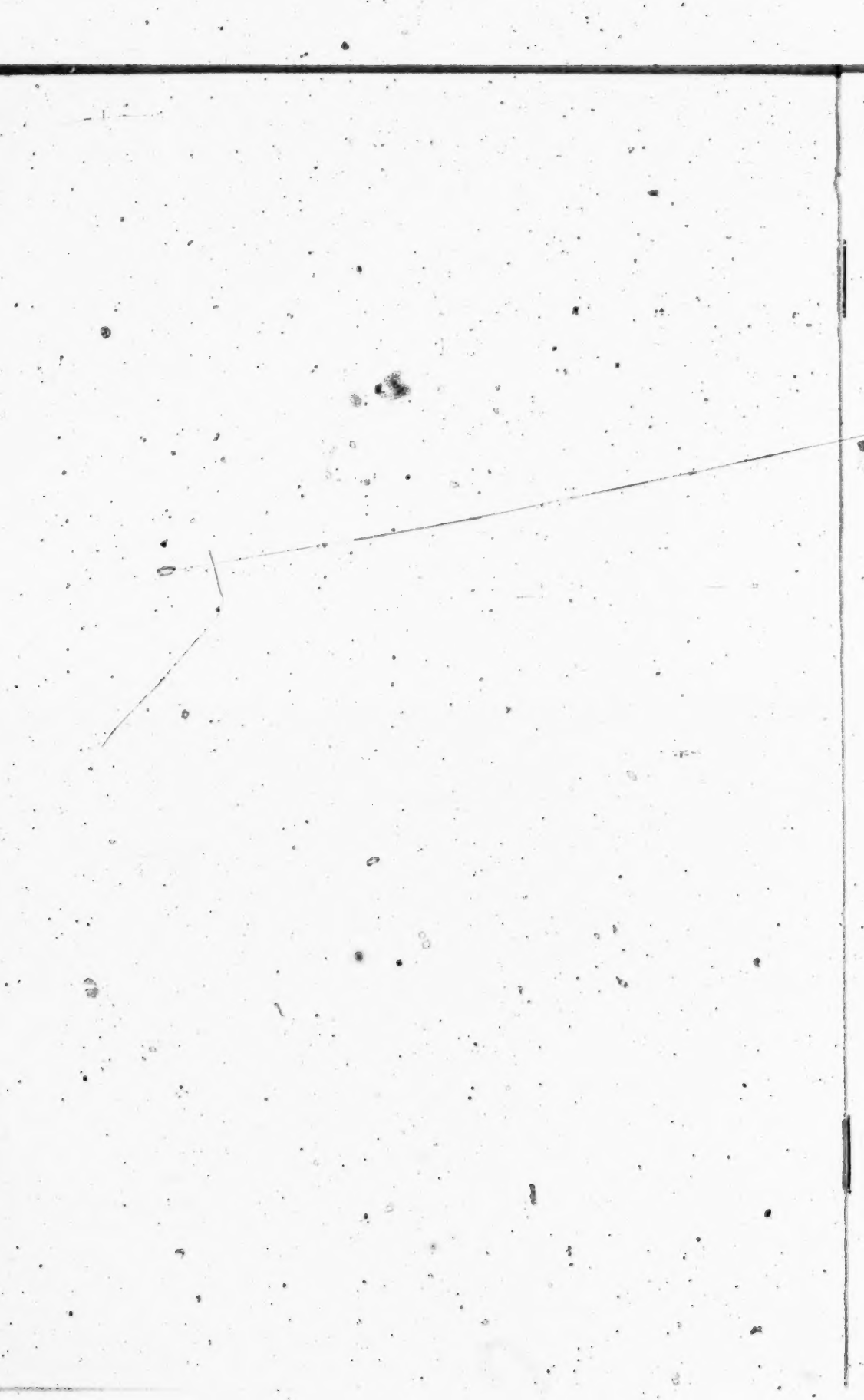
The same conclusion is warranted with respect to the testimony of the Witness Detective Bennett who carried on the face to face conversation with the petitioner while wired and geared for broadcasting—again without antecedent justification by a neutral magistrate.

To do otherwise than suppress this testimony allows the police the best of two possible worlds. If the tape supports them, the victim is scientifically shut out of a rebuttal. Should the tape not verify the police or be garbled, as

here, then the eavesdropper's "remembered" product of the illegal acquisition is used to convict. An electronic search can become a monstrous weapon if the yield is not accurately and clearly preserved and made available to both sides without an alternative product (i.e. oral testimony) available to the State should the recording be faulty. Whether the fault is deliberate or not is immaterial.

Respectfully submitted,

JACK G. DAY,
Counsel for Petitioner.



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PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

Petitioner, Alexander Birns, respectively requests that this Court grant a rehearing of its order of January 15, 1968 denying his petition for writ of certiorari and that a writ of certiorari issue to the Supreme Court of Ohio in the above styled case as prayed for in the petition filed on October 21, 1967.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

Petitioner says that subsequent to the filing of his petition for rehearing he filed a supplemental brief pursuant to Rule 24(5) discussing the application of *Katz vs. United States*, ____ U. S. ____, 19 L. Ed. 2nd 576 (1967). This supplement was docketed in the Supreme Court on January 10, 1968, and may have arrived too late for consideration by the Court before its decision to deny certiorari.[1]

[1] The *Katz* case came down on December 18, 1967.

On the assumption that the *Katz* case raises new issues and that the Court has not had the occasion to consider the *Katz* case in conjunction with the other grounds for certiorari, Petitioner files this petition for rehearing.

CONCLUSION.

For reasons set out here and in the petition for a writ of certiorari and the supplemental brief, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Supreme Court of Ohio as prayed for.

Respectfully submitted,

JACK G. DAY,
Counsel for Petitioner.

CERTIFICATION.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

JACK G. DAY,
Counsel for Petitioner.